# Petition

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NO._____

IN THE
**SUPREME COURT OF THE UNITED STATES**

October Term, 1981

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

*Petitioners,*

v.

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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## QUESTIONS PRESENTED

1. Where a scheme of federal regulation recognizes the right of airport proprietors to impose restrictions on airport use, such as curfews, does a state have the inherent right, by virtue of its sovereignty as a state, to regulate the exercise of such authority where the airport proprieter is one of the state's political subdivisions?

2. Has Congress demonstrated an intent to preempt state regulation of the otherwise unpreempted authority of political subdivision airport proprietors to impose use restrictions for noise control purposes?

3. Is the doctrine of federal preemption announced in *City of Burbank* v. *Lockheed Air Terminal Inc.* (1973) 411 U.S. 624 still valid in view of (a) subsequent recognition of the right of airport proprietors to impose use restrictions on airport operations and (b) subsequent enactment by Congress of the Quiet Communities Act of 1978?

## PARTIES

*Petitioners:*

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation; ADRIANA GIANTURCO, Director of Transportation of the State of California; and MARK F. MISPAGEL, Chief of the Division of Aeronautics of the Department of Transportation of the State of California.

*Respondents:*

SAN DIEGO UNIFIED PORT DISTRICT; AIR TRANSPORT ASSOCIATION OF AMERICA; AMERICAN AIRLINES, INC., a corporation; CONTINENTAL AIR LINES, INC., a corporation; DELTA AIR LINES, INC., a corporation; HUGHES AIR CORPORATION, a corporation d/b/a AIR WEST; NATIONAL AIRLINES, INCORPORATED, a corporation; PACIFIC SOUTHWEST AIRLINES, a corporation; UNITED AIR LINES, INC., a corporation; and WESTERN AIR LINES, INC., a corporation.

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K. Aviation Safety and Noise Abatement Act of 1979, Public Law 96-193, 94 Stat. 50 (1980). (Provisions Involved.)

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THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

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v.

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, the State of California, acting by and through its Department of Transportation, and two of

the department's officers, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported as *San Diego Unified Port District* v. *Gianturco* (9th Cir. 1981) 651 F.2d 1306, and appears in appendix A. The opinion of the District Court for the Southern District of California is reported in 457 F.Supp. 283, and appears in appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1981. A timely petition for rehearing and a suggestion for a rehearing en banc were denied on September 21, 1981 (app. B), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

California Public Utilities Code, sections 21669–21669.6—appendix F.

California's Airport Noise Regulations, title 21, California Administrative Code, chapter 2.5, subchapter 6—appendix G.

The Noise Control Act of 1972, Public Law 92-574, 86 Stat. 1234 (1972)—appendix H.

The Quiet Communities Act of 1978, Public Law 95-609, 92 Stat. 3079 (1978)—appendix I.

The Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705 (1978)—appendix J.

The Aviation Safety and Noise Abatement Act of 1979, Public Law 96-193, 94 Stat. 50 (1980)—appendix K.

## STATEMENT OF THE CASE

This action for declaratory judgment and injunctive relief was brought by the San Diego Unified Port District (hereafter the Port District) [1] against the Department of Transportation of the State of California, and two of its officers, Adriana Gianturco, Director of Transportation, and Elwin J. McKenney, Chief of the California Division of Aeronautics (hereafter collectively referred to as the State).[2] District court jurisdiction was invoked pursuant to 28 U.S.C. sections 1331 and 1337.

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[1] The Port District is a special district created by act of the California Legislature (San Diego Unified Port District Act, Cal. Stats. 1962, First Ex. Sess., ch. 67; Cal. Harb. & Nav. Code, app. 1, § 1 et seq. [West Supp. 1977]).

[2] Elwin J. McKenney has been succeeded by Mark F. Mispagel as Chief of the Division of Aeronautics.

The Air Transport Association of America and the various airlines serving Lindbergh Field (hereafter collectively referred to as the Airlines) intervened as plaintiffs.

This dispute resulted from an order of the California Department of Transportation following administrative proceedings undertaken pursuant to state regulations developed for the purpose of controlling airport noise. The regulations are contained in title 21, California Administrative Code, chapter 2.5, subchapter 6, section 5000 et seq. (app. G) and implement provisions of the State Aeronautics Act contained in the California Public Utilities Code commencing with section 21669 (app. F).

**1. California's Regulatory Provisions.**

The California Legislature was closely involved in the regulation development process. The original statute provided for an advisory committee, appointed by then Governor Reagan, to assist in their preparation. The statute further contemplated the possibility that the Legislature might adopt different standards if not satisfied with those promulgated. (See Cal. Stats. 1969, ch. 1585, Cal. Pub. Util. Code §§ 21669.1–3; app. F-1 to 3.)

As stated in section 5001, the regulations are designed "to protect the public from noise and to resolve incompatibilities between airports and their surrounding neighbors."

In order to provide a systematic method for evaluating and eventually reducing noise incompatibilities, it was first necessary to provide means for quantifying the airport noise problem in terms of impact on the surrounding community. The regulations provide for a cu-

mulative noise measurement technique designed to combine the noise of individual aircraft flights into one overall noise exposure figure averaged over a period of time. The measurement technique, referred to as "CNEL," takes into consideration the number of aircraft operations, the noise intensity of these operations, the duration of the individual events, and the time of occurrence.

The heart of California's regulatory process is section 5062. This section, in effect, requires the airport proprietor to operate its airport so that excessive noise levels do not embrace incompatible land uses—primarily residential. A schedule of phased compliance is provided for in section 5012, with airports being required to meet the ultimate 65 CNEL requirement by January 1986.

For purposes of meeting the section 5062 requirement, California's regulatory scheme places primary responsibility on the airport proprietor. The proprietor is free to choose those methods deemed best suited for achieving compliance. Various approaches are suggested (§ 5011), but none are mandated. However, if the proprietor does not meet the requirement imposed by section 5062, the proprietor must then secure a variance from the California Department of Transportation. The department, in granting a variance, is authorized to impose reasonable conditions (§ 5075).[3]

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[3] California's airport noise regulations were challenged in *Air Transport Association of America* v. *Crotti* (N.D.Cal. 1975) 389 F.Supp. 58 (three-judge court). Although the court struck down a single-event criminal fine process (not relevant here), the court left intact the CNEL regulatory process. The single-event requirement has since been eliminated from the regulations by amendment.

The *Crotti* court characterized California's regulations "as a commendable progressive state-sponsored effort toward the future

**2. The Lindbergh Field Variance.**

A variance was requested by the Port District with regard to its operation of Lindbergh Field. An administrative hearing was held which ultimately led to a proposed decision adopted by the Department of Transportation. That decision is set forth in appendix E.

The adopted decision granted the variance subject to compliance with a number of conditions, one of which, Condition 4, required the Port District to extend its existing six-hour curfew to eight hours.

**3. The Proceedings Below.**

The Port District and the Airlines challenged the constitutionality of Condition 4 and ultimately sought a preliminary injunction prohibiting enforcement. The district court viewed the "crucial issue in the case" to be:

> "Is Condition 4 of the state noise variance unconstitutional because it invades a field preempted by federal law?" (457 F.Supp. 283, 290; app. C-15.)

Answering this question affirmatively, the district court issued its preliminary injunction prohibiting the State from terminating, revoking, or further conditioning the variance for failure of the Port District to comply with Condition 4, or from thereafter utilizing the variance procedures, or other provisions of California law, for the purpose of imposing, or requiring the Port District to impose, a curfew on airport operations at Lindbergh Field. See appendix D.

Since the district court's legal conclusion was decisive of the case, the State appealed to the United States

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safety and protection of its citizenry from the ever increasing aircraft produced noise nuisances." (*Id.* at 62.)

Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. section 1292(a)(1) urging that the preliminary injunction was based on an erroneous legal premise and should therefore be reversed. (See, e.g., *Delaware and Hudson Railway Company* v. *United Transportation Union* (D.C. App. 1971) 450 F.2d 603, 619–623, cert. den., 403 U.S. 911 and *Douglas* v. *Beneficial Finance Co. of Anchorage* (9th Cir. 1972) 469 F.2d 453, 454.)

The Court of Appeals affirmed holding that "the doctrine of federal preemption prevents the State of California from directing a political subdivision to impose a curfew on aircraft flights." (651 F.2d at 1308; app. A-1, 2.)

## STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

**1. An Overview: This Case Presents Important Questions Regarding the Doctrine of Federal Preemption, the Political Structure of State Government, and Federal-State Relations Which Should Be Reviewed by This Court.**

In *City of Burbank* v. *Lockheed Air Terminal Inc.* (1973) 411 U.S. 624, this Court, by a five to four decision, concluded that federal agencies had "full control over aircraft noise, pre-empting state and local control." (*Id.* at 633.) Justice Douglas, writing for the majority, held:

> "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption. . . ." (*Id.* at 633.)

Left open, however, was the question of whether an airport proprietor would be so preempted. (*Id.* at 635, n. 14.)

During the years since *Burbank*, it has been established both judicially and administratively that *Bur-*

*bank's* broad rule of preclusion does not apply to airport proprietors.[4] It is thus today no longer true, as was found to be the case in *Burbank*, that congressional objectives are dependent on "a uniform and exclusive system of federal regulation . . . ." (*Burbank, supra*, 411 U.S. at 639.)

The underlying question presented here is whether a state may regulate these otherwise unpreempted activities where the airport proprietor is one of the state's political subdivisions.[5]

It is California's position that a state may properly require its political subdivisions to marshal their unpreempted proprietary powers to control airport noise as a condition to state approval of continued noncompliance with state-mandated noise level requirements.

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[4] See, e.g., *British Airways Board* v. *Port Authority of New York* (2d Cir. 1977) 558 F.2d 75 and *Santa Monica Airport Association* v. *City of Santa Monica* (9th Cir. 1981) 659 F.2d 100. This is particularly true with regard to restrictions on the *use* of an airport, including curfews. As stated by the district court herein:

> " . . . The courts recognize that an airport proprietor may restrict the use of its facilities on the basis of noise considerations without running afoul of the preemption doctrine . . . . The role of airport proprietors in developing noise abatement programs has been endorsed by the FAA, *see* Dept. of Transportation, Aviation Noise Abatement Policy 34 (Nov. 18, 1976), and the Supreme Court has declined to hold that Congress has preempted the field of noise regulation to the exclusion of airport proprietors . . . . Thus, an airport proprietor remains free to impose curfews on aircraft activity at its airport. . . ." (457 F.Supp. 283, 291; app. C-17.)

[5] As noted *supra*, page 4, California's regulatory provisions were legislatively reviewed before going into effect. Even if it were otherwise, administrative regulations implementing a statute have the force and effect of law unless in conflict with express statutory provision. (*United States* v. *New Orleans Public Service, Inc.* (5th Cir. 1977) 553 F.2d 459, 465.) "The law is not different with respect to the rules and regulations of a department of a state government." (*Maryland Casualty Co.* v. *United States* (1919) 251 U.S. 342, 349.)

The Court of Appeals, while recognizing that airport proprietors have been given "special, although undefined, leeway" to control "the sources of aircraft noise" (651 F.2d at 1316; app. A-20), nevertheless concluded that such unpreempted activities are *not* subject to state regulation for the reason that state regulation of the field *is* preempted. Thus, the opinion reflects a striking departure from the rationale of *Burbank* in that state regulation has been preempted even in the absence of a "pervasive control" vested in federal agencies. Moreover, the conclusion was reached, not based upon any expressed intent of Congress, but instead upon an analysis of "national policy" undertaken for the purpose of discerning "whether a given state regulation, or for that matter, any state regulation, could be compatible with the attainment of the national policy's objectives." (651 F.2d at 1311; app. A-8.)

The Court of Appeals' conclusions on national policy were premised largely on its analysis of this Court's opinion in *Burbank*. And, despite the fact that *Burbank* had nothing whatever to do with an issue of whether a state may regulate the otherwise unpreempted activities of political subordinates, the Court of Appeals found *Burbank* to be controlling stating: "Stare decisis seems to dictate affirmance." (651 F.2d at 1312; app. A-11.) Focusing on *Burbank's* result, the court concluded: "Here, as in *City of Burbank*, a governmental entity was attempting to impose a mandatory curfew on an unwilling airport proprietor." (651 F.2d at 1312; app. A-11.)

As will be shown below, the Court of Appeals' views

are in serious conceptual conflict with numerous decisions by this Court and by other circuits. Where a political subdivision is involved, it cannot be asserted that the State of California does not fit within the proprietary exception, *because it necessarily follows that the state itself is the ultimate repository of such proprietary power.* The "unwilling airport proprietor" in *Burbank* was not a political subdivision being regulated by the state, but was instead a *private corporation* faced with attempts by the city where it was located to impose controls under a zoning ordinance.

The Court of Appeals' opinion, and the manner in which it relies upon *Burbank,* can only lead to great confusion and uncertainty regarding the role of the states in controlling noise associated with their publically operated airports. Surely, before the State of California is left with a result that its authority is something less than that of its political subordinates, the importance of the issues presented deserve consideration by this Court. And the question of whether the preemption doctrine announced in *Burbank* can be extended so as to usurp state authority over political subdivisions is a matter which properly should only be settled by this Court.

Other fundamentally important considerations are also involved. These include the question of whether the Court of Appeals' analysis of preemption, and its attempt to define "national policy" for the purpose of prohibiting state action, are in conflict with recent decisions by this Court holding that "a State's power to fashion its own policy . . . is not to be denied on the basis of

speculation about the unexpressed intent of Congress" but instead should only be precluded where there is "a clear manifestation of [congressional] intention to do so." (See *New York Telephone Company* v. *New York State Department of Labor* (1979) 440 U.S. 519, 545, and *New York State Department of Social Services* v. *Dublino* (1973) 413 U.S. 405, 413 and 417.)

Also present is the most important question of whether federal law can ever be permitted to drive a wedge into a state's political structure breaking it into pieces for purposes of preemption analysis. As argued by the State of Illinois below, it is clearly impractical for a state to effectively perform all of its governmental powers and responsibilities directly through its legislative and executive branches. It is thus the inherent right of a sovereign state to create and control political subdivisions for the convenient and efficient allocation and exercise of the various government powers retained by the states under the Constitution. Any attempt to divest a state of its authority to control its subordinate agencies would wholly impair a state's ability to effectively govern. Federal power to divide is federal power to destroy. The Supremacy Clause cannot be read as authorizing this result, even where taken under the guise of national purpose. It is not a matter of specific Constitutional prohibition because "[t]he Constitution, *in all its provisions, looks to an indestructible Union, composed of indestructible States.*" (*Texas* v. *White* (1869) 7 Wall. (74 U.S.) 700, 725, emphasis added.)

Because these issues involve an important aspect of the interplay of state and federal authority, and because

of the need for clarifying the implications of the *Burbank* decision, it is respectfully submitted that certiorari should be granted. (*Cf., Securities and Exchange Commission* v. *United Benefit Life Insurance Company* (1967) 387 U.S. 202, 207, and *Federal Trade Commission* v. *Bunte Bros.* (1941) 312 U.S. 349, 350.)

**2. The Decision Below Conflicts with Decisions of This Court Recognizing the Inherent Right of a State to Regulate the Activities of Its Political Subdivisions.**

The Court of Appeals' holding broadly precludes state regulation of the so-called "proprietary exception." Much of the court's analysis, however, is devoted to answering an argument never made—namely, that the California Department of Transportation (Caltrans) is a proprietor of the airport. [6] Unfortunately, by focusing on this false issue, the court was distracted from the truly fundamental question presented. That question is whether the State of California has the inherent power to provide, through its legislative and administrative processes, legal mechanisms to affect the manner in which its political subdivisions choose to act under state delegated authority which Congress has left unpreempted. If the answer to this question is "yes," the fact that the California Legislature has looked to the California Department of Transportation to represent the state's interests reflects nothing more than the internal workings of state government.

Although the Court of Appeals recognized the power that a state ordinarily exercises over its political subdivi-

[6] Indeed, the State below expressly disclaimed making any such argument. (Appellants' Reply Brief, pp. 5–6.)

sions, the court nevertheless found that there are "well-settled limits to that power, such as federal preemption." (651 F.2d at 1316; app. A-19.)

The vice of this analysis is its failure to recognize that whatever proprietary authority a political subdivision may exercise, is, in reality, *an authority of the state itself*. The state is the ultimate repository of all such proprietary power. A political subdivision is merely an agent of the state, and, as such, has no authority to act at all, except as has been derived from the paramount authority of the principal it represents. One cannot therefore assert that the proprietor has a power and at the same time assert that the state itself is powerless to regulate the exercise of that power. The two are indivisible. It thus follows that when federal law failed to preempt local agencies operating airports, it left them free to act in the manner as it found them—namely, political subdivisions of state government, subject to the underlying authority of the states they represent. [7]

A state's retained power over its political subdivisions is not, in reality, an exercise of the police power as was

[7] No question is presented here as to whether a state can manipulate its political subdivisions so as to interfere with the constitutionally protected rights of its citizens. Constitutionally protected rights must be respected whether action is taken directly by a state or indirectly through one of its subordinate agencies. (*Avery* v. *Midland County, Texas* (1968) 390 U.S. 474, 479.) This rule is entirely consistent with the State's position herein. As observed in *Avery*, a state's political subdivisions must respect rights protected under the Fourteenth Amendment because "[t]he actions of local government *are* the actions of the State. . . ." (*Id.* at 480, emphasis by the Court.) See also *Gomillion* v. *Lightfoot* (1960) 364 U.S. 339. The distinction to be made in cases involving the asserted rights of individuals is pointed out in *Sailors* v. *Board of Education of County of Kent* (1967) 387 U.S. 105, 108–109.

suggested by the Court of Appeals (see 651 F.2d at 1312; app. A-11).[8] When a state acts with respect to the powers and duties of subordinate agencies, it acts in its sovereign role, exercising its powers to direct government action and organize its own governmental affairs. Such actions also represent an exercise of the state's inherent power over the administration of its public resources—a power which was retained when the political subdivision was created, and of which the state cannot be divested.

The Court of Appeals' conclusion herein—and, indeed, much of the court's analysis—fails to give proper recognition to the relationship existing between a state and its political subdivisions. The result is a holding squarely opposed to *Air Transport Association of America* v. *Crotti* (N.D.Cal 1975) 389 F.Supp. 58. And, although *Crotti* was district court decision, the fact that it involved the very regulations at issue herein, the fact that it was a three-judge opinion also applying *Burbank*, and the further fact that the Court of Appeals herein states that its decision is consistent with *Crotti* (651 F.2d

[8] Such actions certainly do not involve an exercise of the "police power" of the sort involved in *Burbank*, nor as that term is ordinarily used. See, e.g., *Goldblatt* v. *Town of Hempstead, New York* (1962) 369 U.S. 590, 594, finding that "[t]he term 'police power' connotes the time-tested conceptional limit of public encroachment upon *private* interests. . . ." (Emphasis added.) See also: *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.* (1981) ___ U.S. ___, 101 S.Ct. 2352, 2367 (distinguishing state regulation of "private activity," citing *Burbank* as an example), and *New York Telephone Company* v. *New York State Department of Labor* (1979) 440 U.S. 519, 532–533, 545–546 (stressing the importance of distinguishing cases involving state regulation of private conduct for purposes of preemption analysis).

at 1315–1316, n. 24; app. A-18), all reflect the underlying need for clarifying and resolving the effect of *Burbank's* holding on state authority.

The Court of Appeals found that "[t]he *Crotti* decision nowhere intimated that the power to regulate subdivisions was unlimited by the Constitution." (651 F.2d at 1316; app. A-19.) The Court of Appeals was mistaken. *Crotti*, first of all, found that there was "necessarily involved" a related issue of state imposed sanctions "against the municipality proprietors for failure to perform mandatory affirmative action in the field of control and regulation of aircraft operations." (389 F.Supp. at 63.) The *Crotti* court then held:

> "It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a *public* airport; his right to control the use of the airport is a necessary concomitant, *whether it be directed by state police power or his own initiative.* . . . That correlating right of proprietorship control is recognized and exempted from judicially declared federal pre-emption by footnote 14 [in *Burbank*]. . . ." (389 F.Supp. at 63–64, emphasis added.)

Regardless of whether one agrees with *Crotti's* characterization of state power as an exercise of "police power," it would be hard to find a clearer expression of the rule that, despite *Burbank,* a state remains free to direct an airport proprietor's control over the use of a *publically* operated airport.

The *Crotti* court relied primarily on *City of Trenton* v. *State of New Jersey* (1923) 262 U.S. 182, 185–187, a case holding that in the absence of *state* constitutional provi-

sions, "municipalities have no inherent right of self-government which is beyond the legislative control of the state." (*Id*. at 187.) *Trenton,* in turn, relied on *Hunter* v. *City of Pittsburgh* (1907) 207 U.S. 161 where it was held:

> "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . *In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.* . . . " (*Id.* at 178, emphasis added.)

See also *Reynolds* v. *Sims* (1964) 377 U.S. 533 and *Atkin* v. *State of Kansas* (1903) 191 U.S. 207. In *Reynolds* this Court stated:

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . ." (377 U.S. at 575.)

This view of state political subdivisions has been closely adhered to by other circuits. Thus in *City of Dallas, Texas* v. *Southwest Airlines Co.* (5th Cir. 1974) 494 F.2d 773, an airport proprietor asserted a right to close Dallas' Love Field to a carrier certificated by the Texas Aeronautics Commission. The Fifth Circuit held:

> "Southwest has been certificated by the Commission into Love Field and directed to continue service there until told otherwise. At a minimum, this consti-

tutes Texas' exercise of its power to determine that Southwest's is not an improper use of Love Field. Dallas being Texas' creature, it may not declare otherwise. . . ." (494 F.2d at 777.)

See also *Commissioners of Highways of Towns of Annawan* v. *United States* (7th Cir. 1981) 653 F.2d 292. This case involved the right of the State of Illinois to control its Commissions of Highways. Citing *City of Trenton* v. *State of New Jersey, supra,* 262 U.S. 182, the Seventh Circuit held:

"Commissions of Highways, which are legislatively created municipal corporations, . . . are creatures of the State, possessing only those powers and privileges which the State may choose to grant. . . .

"As plaintiffs' [the Commissions'] creator, *the State retains the power to control the disposition and use of its creatures' property.* . . ." (653 F.2d at 296, emphasis added.)

The principal fallacy of the Court of Appeals' opinion herein is that it treats California, its state level agencies, and its local agencies of government, as though they were separate, distinct, and independently sovereign entities. In California's view, this separate and independent entity approach is at the heart of much faulty analysis in the opinion. One illustration is the heavy emphasis placed by the court on the fact that the California Legislature has made the Port District, rather than the California Department of Transportation, liable for airport related noise. However, this legislative determination has nothing whatever to do with the right of the California Legislature to also exercise a continuing control over Port District activities, choosing, if it

desires, to utilize the services and executive branch capabilities of California's Department of Transportation. No matter how its funds are derived and spent, the Port District still acts for the State of California, is clothed with the state's powers, and must be responsive to the authority of the principal it represents. That authority includes the right of the California Legislature to provide for checks and balances to govern its actions.

It is further submitted that the Court of Appeals' failure to comprehend the State's reliance on *National League of Cities* v. *Usery* (1976) 426 U.S. 833 (see 351 F.2d at 1319, n. 36; app. A-26) stems solely from its faulty separate and independent entity premise. The State has argued from the beginning that the California Legislature has an inherent right to regulate the unpreempted activities of political subdivisions. When, however, a contrary argument was urged below, relying on a Civil Aeronautics Board suggestion (44 Fed.Reg. 9951, Feb. 15, 1979) that Congress intended "that the airport proprietor must be acting on its own, not under legislative compulsion . . . ," the State responded that such a view, if adopted in the case of proprietors which are political subdivisions, would be contrary to *Usery*. There this Court held:

> "But we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. . . . *Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. . . .*" (426 U.S. at 854–855, emphasis added.)

It is hard to know how the State's position could have been made clearer. Viewed from the perspective of determining whether Congress can, under circumstances present here, insulate a state's political subdivisions from control of the state's legislature, it would indeed appear, under *Usery,* that Congress is not free to prohibit legislative compulsion as was suggested by the Civil Aeronautics Board.

But stronger and more compelling concepts are here involved than the principle announced in *Usery.*

In *Usery,* the issue was whether federal law can regulate a state's conduct of its affairs in a given area. Here, however, the issue is whether federal law can interfere with a state's political structure. This is a different matter. And the divided views of this Court in *Usery,* and the significance of Justice Blackmun's concurring opinion in *Usery,* [9] are not relevant, for the Court of Appeals has done more than merely attempt to give priority to national policy over state policy. The decision assumes a structure of state government that is simply nonexistent. It does this by failing to recognize that a state's political subdivision is inseparably linked to the authority of the state of which it is but a part. [10]

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[9] See, e.g., *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.* , ____U.S.____, 101 S.Ct. 2352, 2366, n. 29.

[10] It is recognized that some circuits have held that political subdivisions have *standing* to sue a state. See *Rogers* v. *Brockette* (5th Cir. 1979) 588 F.2d 1057, cert. den., 444 U.S. 827. As noted by the Court of Appeals, such an issue was avoided here by the intervention of the Airlines. (651 F.2d at 1309–1310, n. 7; app. A-5.) *Rogers* v. *Brockette* , however, also suggests that there is reason to believe that Congress may interfere with a state's internal political organization in ways that the Constitution itself does not interfere. (588 F.2d at 1070.) This language arguably supports a position contra to that urged herein. However, the language was

**3. The Decision Below Conflicts with Decisions of This Court Holding that Preemption of State Action Must Be Based Upon a Clear Manifestation of Congressional Intent.**

Assuming, arguendo, that Congress could insulate a state's political subdivisions from state regulatory control, the next question presented is whether Congress has actually attempted to do so.

Preemption is sometimes required by the express terms of a federal statute. This is not such a case. Preemption, if it exists, must be premised on *inference,* as was the case in *Burbank.* Nevertheless, it is well settled that any application of the preemption doctrine must give effect to the intent of Congress. (*New York Telephone Company* v. *New York State Department of Labor, supra,* 440 U.S. 519, 540.) "The purpose of Congress is the ultimate touchstone. . . ." (*Malone* v. *White Motor Corporation* (1978) 435 U.S. 497, 504.) Moreover, "[t]his Court is generally reluctant to infer pre-emption. . . ." (*Exxon Corporation* v. *Governor of Maryland* (1978) 437 U.S. 117, 132.)

Although the Court of Appeals' opinion gives lip service to these principles, the opinion then proceeds to disregard them. It does so by embarking on an analysis of "national policy," principally derived from its reading of *Burbank,* and by then assuming that its conclusions on national policy reflect the goals of Congress, despite con-

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dicta and the court expressly found it unnecessary to decide any such question. Moreover, even on the question of standing, there is conflict in the circuits as to whether political subdivisions can sue their state creators. See *City of South Lake Tahoe* v. *California Tahoe Regional Planning Agency* (1980) ___U.S.___, 101 S.Ct. 619, 621, White and Marshall, JJ., dissenting from denial of certiorari.

gressional silence on the subject.

It is, of course, one thing to find that a state is preempted from regulating noise; but it is quite another thing to find that a state is preempted from regulating one of its political subdivisions. Yet that is the result of the Court of Appeals' decision.

In reaching this result, the Court of Appeals has decided the issue in a way which conflicts with applicable decisions of this Court.

As stated in *New York State Department of Social Services* v. *Dublino, supra,* 413 U.S. 405, 413:

> "This Court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them.
>
> " 'If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.' . . ."

The Court of Appeals' opinion fails to point to any congressional enactment, or language from underlying legislative history, which suggests that national purposes can only be served if the usual authority a state exercises over its political subdivisions is first severed. Indeed, it must be assumed that Congress was aware of the established structure of state government, and this being so, would have articulated its intent, had it sought to divest the states of their historic powers. (Cf. *Ranes* v. *Office Employees International Union, Local No. 28* (7th Cir. 1963) 317 F.2d 915, 917–918; *Kansas City, Missouri* v.

*Federal Pacific Electric Company* (8th Cir. 1962) 310 F.2d 271, 275.)

As for the Court of Appeals' reliance on *Burbank,* the fact that airport proprietors are not preempted from imposing use restrictions, including curfews, in and of itself should caution against application of *Burbank's* pervasive control rationale.[11] But more importantly, the fact that the instant case does not involve the attempted regulation of *privately owned* airport interests, as was true in *Burbank,* shows that a different preemption analysis is called for. See *New York Telephone Company* v. *New York State Department of Labor, supra,* 440 U.S. 519, 532–533, opinion by Stevens, J., finding that cases involving state laws regulating *private* conduct present an important distinction from a preemption perspective.

In the *New York Telephone Company* case, it was concluded that, absent evidence of congressional intent to deny the states the power to provide unemployment benefits for strikers, the National Labor Relations Act could not be interpreted as achieving this result. Indeed, "the silence of Congress" was actually found to support a "contrary inference." (440 U.S. at 540.)

It is submitted that had the Court of Appeals herein only followed the reasoning of *New York State Department of Social Services* v. *Dublino, supra,* 413 U.S. 405, it would have reached a similar result. Paraphrasing *Du-*

[11] As stated by Justice Douglas in *Burbank* itself: "Our prior cases on pre-emption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question . . . ." (411 U.S. at 638.)

*blino*, if Congress "had intended to pre-empt state plans and efforts" in such an important program as airport noise control, while at the same time leaving a state's political subdivisions free to engage in such activities, "such intentions would in all likelihood have been expressed in direct and unambiguous language . . . ." (*Id.* at 414.) As further stated in *Dublino:*

> " . . . Far more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action . . . ." (413 U.S. at 417.)

The issues in the present case revolve around the right of the State of California, acting by and through its legislative and executive branches, to retain control over a political subdivision it has created to carry out the state's function in operating an airport. The Court of Appeals' opinion fails to demonstrate that Congress has ever attempted to interfere with this right. As stated in *Florida Lime and Avocado Growers, Inc.* v. *Paul* (1963) 373 U.S. 132, 147: "We search in vain for such a mandate." Certainly, all *inferences* should be to the contrary.

**4. The Decision Below Conflicts with the Intent of Congress as Expressed in the Quiet Communities Act of 1978.**

Section 2 of the Quiet Communities Act of 1978 (Pub. Law 95–609, 92 Stat. 3079 (1978); app. I), amended section 14 (42 U.S.C. § 4913) of the Noise Control Act of 1972 (Pub. Law 92–574, 86 Stat. 1234 (1972); app. H). The 1972 Act was given considerable weight in this Court's 1973 *Burbank* decision.

One of the stated purposes of section 14, as it now reads, is "[t]o promote the development of effective

State and local noise control programs . . . ."

Subdivision (c) (1) (C) then provides authority to administer grants to states and local governments for various purposes including:

> "(C) developing abatement plans for areas around major transportation facilities (*including airports,* highways, and rail yards) and other major stationary sources of noise, *and, where appropriate, for the facility or source itself;* . . . ." (Emphasis added.)

It is thus clear that Congress contemplates the development of abatement plans not only for areas around transportation facilities and other stationary sources, but, where appropriate, for the transportation facility or other stationary source itself.

The question arises: Does this include actions which impose use restrictions on sources of noise in interstate commerce? The answer can only be "yes" unless there is actual inconsistency with federal statute or regulation. This is reflected by the concluding paragraph of subdivision (c) (1) which reads:

> ". . . except that no actions, plans or programs hereunder *shall be inconsistent* with existing Federal authority under this Act to regulate sources of noise in interstate commerce; . . . ." (Emphasis added.)

The Court of Appeals saw it otherwise, however, urging that the authority to control stationary sources, such as airports, does not carry with it the authority to control the sources of aircraft noise. (651 F.2d at 1313; app. A-13.) Aircraft "source control" was viewed by the court as an exclusive province of the federal government. [12]

[12] The Court of Appeals' conclusion is partially based upon a claimed distinction between transportation facilities, such as railroads and airports, and stationary sources, such as factories. (651 F.2d 1313; app. A-13.) However, no such distinction appears from

One major problem with the Court of Appeals' analysis is that it obscures the distinction between actions setting noise *emission standards* and restrictions affecting the *use or operation* of noise-producing products in commerce. Whether one desires to treat the latter as a form of "source control" is strictly a matter of semantics, but such a distinction runs throughout the federal approach to noise control, including that relating to airports, and must be recognized.[13]

As observed in *Burbank,* the 1972 Act contains no express provision of preemption with regard to aircraft. (411 U.S. at 633.) However, section 611 of the Federal Aviation Act (49 U.S.C. § 1431) provides federal agencies with authority to develop regulations found necessary for the control and abatement of aircraft noise and sonic boom. Although federal regulations have carved out an exclusive federal role in setting aircraft *emission standards* (see, e.g., 14 C.F.R., part 36), as shown above, the federal government has not undertaken to provide for exclusive federal authority with regard to airport

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the language used by Congress which, instead, speaks in terms of transportation facilities and *other* stationary sources, and which further contemplates abatement plans for both.

[13] In the non-aviation setting, section 6 of the 1972 Act provides exclusive federal authority in setting noise emission standards for products generally but then further provides that nothing in the section is designed to deny the right of any state or political subdivision to establish and enforce controls "through the licensing, regulation, or restriction of the use, operation, or movement" of such products. (42 U.S.C. § 4905(e)(2). See also sections 17 and 18 which similarly provide exclusive federal authority for the development of railroad and motor carrier noise emission standards, but which leave state and local agencies with authority to regulate use where "necessitated by special local conditions" and where "not in conflict with regulations promulgated under this section." (42 U.S.C. §§ 4916(c)(2) and 4917(c)(2).)

usage. Indeed, 14 C.F.R. section 36.5 expressly states:

> "... No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport."

One of the principal recognized means for controlling airport noise, as well as that generated by any other stationary source, is by imposing restrictions on the use of the noise producers. In this context, any authority to develop an abatement plan would ordinarily be viewed as carrying with it the authority to provide for use restrictions, absent some expression to the contrary. The congressional scheme, under the Quiet Communities Act, reflects this approach—an approach which contemplates, and indeed encourages, efforts by others except where there is actual inconsistency with federal law. (*Cf., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware* (1973) 414 U.S. 117, 137.)

It is now established that airport proprietors are not preempted from imposing use restrictions, including curfews. Such actions are considered "appropriate" for controlling airport related noise. Obviously, if proprietary use restrictions do not conflict with the provisions of federal law, this result should follow whether the restrictions are imposed on the proprietor's own initiative or by the proprietor for the purpose of complying with conditions of a variance.

The Court of Appeals sought to avoid the thrust of the concluding phrase in subdivision (c) (1) by suggesting that it must be read in light of *Burbank*. Preemption in *Burbank*, however, was premised on a finding of exclu-

sive federal occupation of the field. The congressional scheme, as reflected by subdivision (c)(1), is premised on inconsistency. Inconsistency with federal law either exists or it does not. It cannot be found by reliance on a case which assumed exclusive federal occupation of the field.

All of this, of course, only points to the real need which now exists for this Court of clarify the present significance of *Burbank* in light of subsequent developments.

**5. Other Recent Acts of Congress, While Recognizing the Authority of Airport Proprietors to Control Airport Use, Do Not Purport to Curtail the Authority of the States to Regulate Their Political Subdivisions.**

In footnote 15 (651 F.2d at 1313; app. A-13, 14), the Court of Appeals suggests that the Airline Deregulation Act of 1978 (Pub. Law 95-504, 92 Stat. 1708 (1978); app. J) and the Aviation Safety and Noise Abatement Act of 1979 (Pub. Law 96-193, 94 Stat. 50 (1980); app. K) are "some indication" that Congress intends to forbid local regulation. Although the State is unable to find any such congressional purpose in either of the two acts, what is most clear is that *neither act purports to undercut the regulatory authority that a state exercises over its political subdivisions.*

As noted by the Court of Appeals, the Airline Deregulation Act is not even "directly applicable." (651 F.2d at 1313, n. 15; app. A-14.) The congressional concern was with economic objectives, not those related to airport noise. Nevertheless, Congress did state that nothing in its preemptive language should be construed to limit the authority of a state or political subdivision, as the owner or operator of an airport, "to exercise its proprietary powers and rights." (§ 4(a) adding § 105(b)(1) to the

Federal Aviation Act of 1958; 49 U.S.C. § 1305(b)(1).) The only effect of this language is to demonstrate congressional recognition of the fact that federal authority to control airport usage is not pervasive. Thus, to the extent that the Act can be said to relate to noise at all, the only conclusion to be drawn is that *Burbank's* premise is no longer valid.

As for the Aviation Safety and Noise Abatement Act, the Court of Appeals (again in footnote 15) suggests that language contained in section 102 (49 U.S.C. § 2102), calling for federal development of a single system of measuring noise, "arguably" supersedes "local systems such as CNEL."

Even if section 102 did preempt the use of California's *measurement* system, and hence required California to use a federal *measurement* system, such a result would hardly support a conclusion preempting California's *regulatory* process, nor would it support the Court of Appeals' finding that states are precluded from regulating the imposition of airport use restrictions. Section 102 relates solely to the choice of measurement system, not to regulation. And even here the indication is that the federally approved system need only be used for the purposes of submitting noise exposure maps and noise compatibility programs for federal review under the voluntary processes provided for by sections 103 and 104 of the Act. (49 U.S.C. §§ 2103 and 2104.) [14]

[14] In response to the Aviation Safety and Noise Abatement Act, the Federal Aviation Administration has recently identified a measurement system, practically identical to California's CNEL method, known as day-night average sound level ($L_{dn}$). (46 Fed. Reg. 8316, Jan. 26, 1981.) There is nothing, of course, to prevent California from conforming the measurement system used in its regulatory approach to that now proposed by the federal government. Since the systems are basically the same, this could readily

The real significance of both the Airline Deregulation Act and the Aviation Safety and Noise Abatement Act to the present problem is that both acts are consistent with, and indeed recognize, the authority of airport proprietors to develop use restrictions for their airports. Thus, even if such restrictions are viewed as a type of aircraft "source control" (as was done by the Court of Appeals), the clear indication is that Congress does not view this approach to noise control as the exclusive province of the federal government. If nothing else, the two acts suggest the need for a reassessment by this Court of its holding in *Burbank*.

In *Burbank*, the majority opinion was concluded with the following observation:

> "We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." (411 U.S. at 640.)

It is now clear that at least those municipalities operating airports *have* been let in on the planning. Since such municipalities are merely agents acting on behalf of the states, it follows that the states have an inherent right to also be involved in the planning. And if, at worst, one assumes that Congress could divest a state of its authority over the otherwise unpreempted activities of its po-

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be done. Whether this will be done, so that California airports will not need to convert from one system to the other for the purposes of federal reporting, remains to be determined. But the question of whether or not maps and programs submitted for federal review must be expressed in terms of CNEL or $L_{dn}$ has nothing to do with whether California can regulate the imposition of use restrictions by political subdivisions.

litical subdivisions, there is still nothing in the Airline Deregulation Act or the Aviation Safety and Noise Abatement Act which even remotely suggests a congressional intent to do so. As argued earlier, had Congress intended to preempt state authority over political subdivisions, it would have said so in clear and unmistakable terms.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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DECEMBER 1981

# Appendix

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No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1981

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

*Petitioners,*

v.

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX ONLY

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# APPENDIX A

## APPENDIX A

**SAN DIEGO UNIFIED PORT DISTRICT, Plaintiff-Appellee,**

**and**

**Air Transport Association of America, et al., Intervening Plaintiffs-Appellees,**

**v.**

**Adriana GIANTURCO, et al., Defendants-Appellants.**

**No. 78-3260.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 2, 1979.

Submission Vacated June 5, 1981.

Resubmitted June 11, 1981.

Decided July 30, 1981.

Appeal from the United States District Court for the Southern District of California.

Before WRIGHT * and TANG, Circuit Judges and CURTIS,** Senior District Judge.

PER CURIAM:

We must determine whether the doctrine of federal preemption prevents the State of California from directing a political subdivision to impose a curfew on aircraft

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* This appeal was argued before a panel of Circuit Judges Kennedy and Tang, and District Judge Curtis. Judge Kennedy has recused himself and Judge Wright has replaced him.

** Of the Central District of California.

flights. In making our determination, we interpret the Supreme Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), and later federal statutes. We affirm the district court which concluded that the state could not impose these curfew regulations.

The political subdivision which asserts the invalidity of the state's attempted imposition of a curfew is the San Diego Unified Port District. The Port District owns and operates San Diego International Airport, Lindbergh Field. Lindbergh Field is the principal airport serving San Diego, and is near the downtown area. Five million passengers pass through the airport each year. This volume of traffic requires frequent jet flights, which produce jet noise that has vexed local residents for some years.

The Port District has attempted to accommodate the needs of commerce and the quiet of San Diego residential areas, by, among other things, unilaterally imposing a midnight to 6:00 a.m. curfew on all commercial jet takeoffs. In addition, the curfew allows only jets meeting strict noise standards to land during those hours.

In spite of these efforts, the State of California, through its Department of Transportation [CalTrans], has attempted to impose a more restrictive curfew through regulations authorized by state statute. *See* Cal.Pub.Util.Code § 21669 (West Supp. 1981).

These would require the measurement of noise at all affected airports and forbid operation of those airports which exceed a preset noise level. *See* 21 Cal.Admin.

Code § 5000–5080.5 (1977).[1] Airports which routinely exceed this level cannot operate without a variance issued under procedures established by the regulations. *Id.* § 5062.[2]

Lindbergh Field is in this category, and in January of 1977 the Port District applied for a variance permit pursuant to CalTrans' regulations.[3] A state administrative law judge granted the permit, subject to six conditions. The fourth condition lies at the heart of this lawsuit and provides:

Respondent San Diego Unified Port District is to retain the existing curfew . . . . Respondent is to extend this existing curfew to the extent that commercial air carriers will not be permitted to take off between the hours of 11:00 p.m. and 7:00 a.m. and commercial air

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[1] These regulations provide both substantive provisions setting the level of permissible noise, 21 Cal.Admin.Code §§ 5001–5014 (1977), as well as a procedural mechanism for the enforcement of those levels, *id.* §§ 5020–5080.5.

The regulations seek to measure ambient aviation noise under the Community Noise Equivalent Level Standard [CNEL]. *Id.* § 5006(f) (1977). CNEL represents a scientific effort to quantify an average person's daily dosage of noise, but by no means is the only available standard. *See* 41 Fed.Reg. 51,522, 51,524 (1976).

[2] The district court found that most major California airports must routinely apply for a variance. 457 F.Supp. at 285. Under CalTrans' regulations, a variance is required unless the airport's "noise impact area" is zero. 21 Cal. Admin. Code § 5062 (1977). In Lindbergh Field's case it was determined that the noise impact area was approximately three-quarters of a square mile, requiring the Port District to apply for a variance. While the regulations allow the attachment of "reasonable conditions" to the grant of a variance, *id.* § 5075(b)(7), the state administrative law judge explicitly found that "[t]here are no realistic solutions presently available to bring Lindbergh Field into compliance with the State Noise Standards."

[3] An earlier variance was granted after hearings in 1975–76. Clerk's Record at 1142–51.

carriers will not be permitted to land between the hours of 11:00 p.m. and 7:00 a.m. unless such aircraft meet FAR Part 36 requirements . . . .

Not willing to extend its curfew another two hours, the Port District sought to enjoin enforcement of the condition. It has contended that federal control of both airspace management and the sources of aircraft noise preempts CalTrans' ability to place such a condition on the variance.

After an initial procedural phase,[4] including the intervention of the Air Transportation Association of America,[5] the district court rendered its decision. 457 F.Supp. 283 (S.D.Cal.1978).

Relying primarily on *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), the court adopted the Port District's position on preemption and issued a preliminary injunction. CalTrans has appealed. The state and several cities have joined it as amici curiae. In addition, the United States [6] and several states have filed briefs amici curiae.

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[4] The court below initially denied the injunction without prejudice until the Federal Aviation Administration had reviewed the proposed curfew, pursuant to the state administrative law judge's order. 457 F.Supp. at 286. Four months later the FAA responded by telephone and indicated that it would not become involved in the matter. *Id.* at 287. The court then proceeded to consider the injunction on the merits.

[5] The Air Transportation Association of America [ATAA] intervened as of right. Fed.R.Civ.P. 24(a)(2). Its complaint alleges that, in addition to being preempted, the proposed curfew violates the commerce clause. Since this case may be disposed of by preemption, we do not reach the commerce clause issues.

[6] The United States has adopted a somewhat peculiar position. It urges neither affirmance nor reversal but states that, in its opinion, this case turns on questions of state law, and it would be inappropriate for it to take a position. The United States does

## I. Preemption and the Underlying Federal Policy

[1] The Port District's attack on condition four rests primarily on the ground that federal law preempts state regulation of airspace management and control of the source of aircraft noise.[7] This preemption, it is claimed, renders CalTrans powerless to require the Port District to accept condition four.

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urge, however, that we definitively name the proprietor of Lindbergh Field, at least for purposes of the federal government's certification program. *See* note 32 *infra*.

[7] In the court below, CalTrans also claimed immunity under the Eleventh Amendment and asserted that the Port District lacked standing. It has abandoned these claims. While a state may waive immunity under the Eleventh Amendment, *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1283 (9th Cir. 1979), it may not also waive the issue of standing. *See Warth v. Seldin*, 422 U.S. 490, 498–99, 95 S.Ct. 2197, 2204–05, 45 L.Ed.2d 343 (1975); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.), *cert. denied*, — U.S. —, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980). We must independently inquire into the parties' standing.

While there are broad dicta that a political subdivision may never sue its maker on constitutional grounds, *see id.*, 625 F.2d at 233–34, we doubt that the rule is so broad. *See City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, — U.S. —, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980) (White & Marshall, JJ., dissenting from denial of certiorari) ("Such a per se rule is inconsistent with [*Board of Educ. v.] Allen* [, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968)]") (establishment clause); *Rogers v. Brockett*, 588 F.2d 1057, 1067–71 (5th Cir.), *cert. denied*, 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979) (supremacy clause). *See generally* Comment, *Municipal Corporation Standing to Sue the State: Rogers v. Brockett*, 93 Harv.L.Rev. 586 (1980).

We need not resolve this question, however, because the court below granted the ATAA the status of an intervenor as of right. If the ATAA has standing, then we have jurisdiction to hear the case. *City of South Lake Tahoe*, 625 F.2d at 233. On the present record, we have no trouble finding that the ATAA has standing. It will suffer injury due to service rescheduling, *see* note 13 *infra*, and it has shown also that it is likely that a decree in its favor will redress this injury. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 79, 98 S.Ct. 2620, 2633, 57 L.Ed.2d 595 (1978).

[2] The district court agreed and issued a preliminary injunction in favor of the Port District. On appeal, a preliminary injunction will not be reversed unless the lower court abused its discretion or based its decision on erroneous legal premises. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980).

CalTrans directs its arguments at the latter half of this test, claiming that the district court erred in relying on the *City of Burbank* case. To assess this claim, we inquire first into the applicable preemption doctrine.

[3] The supremacy clause, U.S.Const., Art. VI, Cl. 2, invalidates any exercise of state power that unduly frustrates or obstructs the objectives of legitimate national policy. *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, ___ U.S. ___, ___, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981); *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1189, 55 L.Ed.2d 443 (1978); *Hines v. Davidowitz*, 312 U.S. 52, 67–68, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

In assessing any claim brought under this clause, we start from the position "that the historic police powers of the states [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). *See also City of Milwaukee v. Illinois*, ___ *U.S.* ___, *101 S.Ct. 1784, 1790, 68 L.Ed.2d 114 (1981); Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977).

[4] Where, as here, Congress has not enacted an explicit preemption clause,[8] state authority may still be displaced if an intent to preempt is "implicitly contained in [the federal statute's] structure and purpose." *Jones,* 430 U.S. at 525, 97 S.Ct. at 1309. *See also City of Milwaukee,* ____ *U.S.* ____, *101 S.Ct. at 1790.*

Such an intent has been inferred when the state regulations could not be enforced "without impairing the federal superintendence of the field . . . ." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or when the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice,* 331 U.S. at 230, 67 S.Ct. at 1152. *See also Chicago & North Western Transp. Co.,* ____ U.S. at ____, 101 S. Ct. at 1130.

Preclusion of state regulation is possible even in cases where the regulated entity can feasibly comply with both state and federal mandates. *See Ray v. Atlantic Richfield Co.,* 435 U.S. 151 at 157–58, 98 S.Ct. 988 at 994, 55 L.Ed.2d 179; *DeCanas v. Bica,* 424 U.S. 351, 356–57 & n.7, 96 S.Ct. 933, 936–37 & n.7, 47 L.Ed.2d 43 (1976); *Pennsylvania v. Nelson,* 350 U.S. 497, 504–05, 76 S.Ct. 477, 481, 100 L.Ed. 640 (1956).

The key to the scope of federal preemption is the

[8] By contrast, many types of aviation regulation are expressly and exclusively federal. For example, states may not regulate the "rates, routes or services of any air carrier" registered under federal law, 49 U.S.C. § 1305 (Supp. III 1979), and the federal government has declared it is "to possess and exercise complete and exclusively national sovereignty in the airspace of the United States." 49 U.S.C. § 1508(a) (1976).

intent of Congress in enacting the applicable federal legislation. *Malone,* 435 U.S. at 504, 98 S.Ct. at 1189; *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963). If this intent does not appear in the statute, the above cases require us to evaluate the effect of the state action on the federal scheme to see if the state action impairs the objectives of national policy. *Chicago & North Western Transp. Co.,* ___ U.S. at ___, 101 S.Ct. at 1130; *Ray,* 435 U.S. at 157–58, 98 S.Ct. at 944; *Hines,* 312 U.S. at 67–68, 61 S.Ct. at 404.[9]

Congress formulates the policies of the national government in its acts and resolutions. Our task is to interpret applicable congressional acts and to define the national policy to discern whether a given state regulation or, for that matter, any state regulation, could be compatible with the attainment of the national policy's objectives. *Jones,* 430 U.S. at 525, 97 S.Ct. at 1309; *DeCanas,* 424 U.S. at 358 n.7, 96 S.Ct. at 937; *Florida Lime & Avocado Growers, Inc.,* 373 U.S. at 142, 83 S.Ct. at 1217. This case requires us to assess the effect of the state regulation on national aviation and aircraft noise policy.

The state regulation in question is easily defined. The state, through its police power, has sought to regulate and restrict aircraft flights directly by requiring the Port District to adopt a more extensive curfew than the Port

[9] *See generally* Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study,* 13 U.C. Davis L.Rev. 1 (1980); Note, *A Framework for Preemption Analysis,* 88 Yale L.J. 363 (1978); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Colum.L.Rev. 623 (1975).

District itself thought necessary and appropriate.

The interpretation and definition of applicable federal policies is more difficult. National policies with respect to aviation and noise are sufficiently complex that we must consider what is implicit in the federal regulatory scheme, its underlying assumptions, intended purposes, and desired effects. *Jones,* 430 U.S. at 525, 97 S.Ct. at 1309.

Much of this task has been performed by the Supreme Court. In *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), it held that a local non-proprietary airport curfew was preempted.

At issue was a city's imposition, under its police power, of an 11:00 p.m. to 7:00 a.m. curfew on the operation of Hollywood-Burbank Airport, owned and operated by Lockheed. Lockheed sought to enjoin the city's ordinance, asserting that federal regulation and administrative action had preempted such legislation.

The Supreme Court affirmed this court's and the district court's finding of preemption. After extensively surveying the Federal Aviation Act of 1958 and the Noise Control Act of 1972, the Court found that Congress unequivocally intended that the federal government have "full control over aircraft noise, preempting state and local control," *id.* at 633, 93 S.Ct. at 1859, and that this congressional intent left "no room for local curfews or other local controls." *Id.* at 638, 93 S.Ct. at 1862.[10]

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[10] In surveying the applicable legislative history, the Court quoted, 411 U.S. at 635, 93 S.Ct. at 1860, the Senate Report which stated that, under the proposed legislation, "[s]tate and local govern-

Further, in order to fulfill the objectives of both acts, "a uniform and exclusive system of federal regulation" was "require[d]." *Id.* at 639, 93 S.Ct. at 1862. Finally, the Court accepted the Solicitor General's statement that the federal government had preempted the field of "airspace management." *Id.* at 627, 639, 93 S.Ct. at 1856, 1862. *See also* 49 U.S.C. § 1348 (1976) (FAA authority over airspace control and facilities). Burbank's curfew was held to invade these preempted areas by regulating both the time when planes could fly and the source of noise emission. *City of Burbank,* 411 U.S. at 638–39, 93 S.Ct. at 1862.[11]

The district court held correctly that *City of Burbank*

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ments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S.Rep.No. 1353, 90th Cong. 2d Sess. 6 (1968), *reprinted in* [1968] U.S.Code Cong. & Ad. News 2688, 2694.

[11] The Court also stated that "the pervasive nature of the scheme of federal regulation of aircraft noise leads us to conclude that there is preemption." *City of Burbank,* 411 U.S. at 633, 93 S.Ct. at 1859. Although the pervasiveness of federal regulation has been little used recently as an independent ground for finding the congressional intent necessary for completely preempting state regulation, *see, e.g., DeCanas v. Bica,* 424 U.S. 351, 359–60, 96 S.Ct. 933, 938, 47 L.Ed.2d 43 (1976); *New York Dep't of Social Servs. v. Dublino,* 413 U.S. 405, 415, 93 S.Ct. 2507, 2513, 37 L.Ed.2d 688 (1973), it is not a dead letter in preemption analysis. *See conference of Fed. Sav. & Loan Ass'ns v. Stein,* 604 F.2d 1256, 1260 (9th Cir. 1979), *aff'd mem.,* 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980) (pervasive regulation of federal savings and loan associations evinces congressional intent to exclude state regulatory control).

In any event, it is clear that *City of Burbank* did not rest solely on pervasive regulation. Indeed, the national character of the subject matter was said to be "the critical issue." *City of Burbank,* 411 U.S. at 625, 93 S.Ct. at 1855 (citing *Cooley v. Board of Wardens,* 12 How. (53 U.S.) 299, 13 L.Ed. 996 (1852)). *See also id.* at 639, 93 S.Ct. at 1862.

controls here. Here, as in *City of Burbank*, a governmental entity was attempting to impose a mandatory curfew on an unwilling airport proprietor. Its authority for the curfew derived from the police power, again as in *City of Burbank*.[12] Condition four would affect many flights,[13] whereas the *City of Burbank* curfew affected only one flight per week. *Id.* at 626, 93 S.Ct. at 1856. Stare decisis seems to dictate affirmance.

CalTrans disagrees. It asserts initially that *City of Burbank* is no longer good law because subsequent congressional and administrative actions evince a retreat from the pervasive federal regulation considered in *City of Burbank*. Second, it argues that, even if *City of Burbank* is good law, California fits within an exception desired by Congress and recognized by the Court.

## II. Federal Regulation following *City of Burbank*

[5] Justice Douglas concluded *City of Burbank* by stating that the Court was "not at liberty to diffuse the

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[12] The noise regulations seek to regulate unwanted noise for the public good, 21 Cal.Admin.Code §§ 5005, 5010 (1977), and apply not just to municipal airports, but to "all existing and future potential airports in California which are [open to the public.]" *Id.* § 5004. This purpose, and the regulations' almost universal application, are both hallmarks of the police power. *See, e.g., New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650, 661, 6 S.Ct. 252, 258, 29 L.Ed. 516 (1885); *Miller v. Board of Public Works*, 195 Cal. 477, 484–85, 234 P. 381 (1925); 6 E. McQuillin, The Law of Municipal Corporations § 2404, at 425–26 (3d ed. 1980).

Moreover, the CNEL regulations have been held to be promulgated pursuant to California's "police power control." *Air Transp. Ass'n of America v. Crotti*, 389 F.Supp. 58, 65 (N.D.Cal. 1975) (three-judge court).

[13] At least five arrivals and four departures daily would be affected directly by the curfew, without accounting for the effect on connecting flights. Clerk's Record at 616, 618, 821.

powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." 411 U.S. at 640, 93 S.Ct. at 1863.

CalTrans asserts that the passage of the Quiet Communities Act of 1978, Pub.L.95–609, 92 Stat. 3079 (1978),[14] demonstrates Congress' intent to reject total federal control of the source of aircraft noise and to involve local governments in the national effort to abate such noise. In essence, this Act provides for a nationwide quiet communities program administered by local government and funded by the federal treasury.

In particular, CalTrans relies on section two of the Quiet Communities Act, which amends the 1972 Noise Control Act relied upon in *City of Burbank*. This section gives the Environmental Protection Agency discretion to disburse funds to local governments for the purpose of: [D]eveloping abatement plans for areas around major transportation facilities (including airports, highways, and railyards) and other major stationary sources of noise, *and where appropriate, for the facility or source itself*; . . . (emphasis added).

42 U.S.C. § 4913(c)(1)(C) (Supp. III 1979).

CalTrans cites the italicized portion of the statute and argues that Congress has explicitly authorized local governments to regulate the "source" of aviation noise unless such regulation would be in direct conflict with existing federal regulation. We disagree.

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[14] *Codified in* 42 U.S.C. §§ 4905, 4910, 4913, 4918, 6901, 6903, 6907, 6913, 6922, 6923, 6925–28, 6947, 6961, 6962, 6964, 6972, 6973, 6977, 6981–6984; 49 U.S.C. § 1431 (Supp. III 1979).

The success of CalTrans' argument rests on a strained interpretion of the statute. First, it interprets "sources" in the last phrase to include transitory sources such as airplanes. This is contrary to the statutory scheme, which distinguishes transportation facilities, such as railyards and airports, from stationary sources, such as factories.

Second, CalTrans construes "abatement plans" to include the control of the sources of aircraft noise. This construction was rejected in *City of Burbank* and, as we discuss below, is inconsistent with other parts of the same statute.

Finally, CalTrans' argument that "where appropriate" means "where possible" or "where not in direct conflict with a federal regulation" begs the pivotal question of this appeal, namely, what scope of state regulation is left unpreempted by federal law. If Congress desired the result CalTrans advocates, it could have drafted the statute to avoid these strained constructions.

Instead, in subsection (c) (1), Congress stated that "no actions, plans or programs hereunder shall be inconsistent with existing Federal authority under [the Noise Control Act of 1972] to regulate sources of noise in interstate commerce." This prohibition was written against the background of *City of Burbank*'s holding that federal authority preempted local control of the sources of aviation noise. We hold that Congress intended to continue such preemption. [15]

[15] We note that other congressional acts subsequent to *City of Burbank* indicate a continuing intent to preclude local regulation. For example, the Aviation Safety and Noise Abatement Act of

CalTrans' attempt to interpret the Quiet Communities Act as a blank check for local control of aviation noise stems, in part, from interpreting *City of Burbank* so broadly as to forbid any state control over aviation noise. This reading confuses controlling the source of noise with mitigating its effect.

An object causing noise can be controlled directly, either by restricting its use or by prescribing noise emission standards. *See, e. g.,* 14 C.F.R., Part 36 (1980). Quite independently of source control the effects of noise may be mitigated. Examples of such steps are compensating those adversely affected,[16] using the zoning power to assure harmonious development,[17] baffling existing noise,[18] or resettling those affected by the noise.[19]

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1979, Pub.L. No. 96-193, 94 Stat. 50 (1980) (to be codified in scattered sections of 49 U.S.C.) provides for the establishment of a national aviation noise measurement system, arguably superseding local systems such as CNEL. *Id.* § 102 (to be codified in 49 U.S.C. § 2102).

Once this system is in place, the Act provides for procedures under which airport proprietors may secure federal immunity from excessive aircraft noise liability. *Id.* § 107 (to be codified in § 49 U.S.C. § 2107). Although we believe that the Airline Deregulation Act of 1978, Pub.L. 95-504, 92 Stat. 1708 (1978) (codified in scattered sections of 49 U.S.C.) is not directly applicable because of its economic objectives, we note that Congress expressly preempted any state regulation affecting "rates, routes or *services* of any air carrier. . . . " *Id.* § 4(a), 49 U.S.C. § 1305(a) (Supp. III 1979) (emphasis added). These acts are some indication that Congress has not changed its collective mind regarding the wisdom of forbidding local regulation of the sources of aircraft noise. Indeed, the Aviation Safety and Noise Abatement Act of 1979 may indicate exactly the opposite.

[16] *See, e.g., Greater Westchester Homeowners Ass'n v. City of Los Angeles,* 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329 (1979), *cert. denied,* —— U.S. ——, 101 S.Ct. 77, 66 L.Ed.2d 22 (1980).

[17] *See, e. g., Wright v. County of Winnebago,* 73 Ill.App.3d 337, 29 Ill.Dec. 347, 391 N.E.2d 772 (1979).

[18] *See, e. g., Air Transp. Ass'n of America v. Crotti,* 389 F.Supp. 52, 64–65 (N.D.Cal.1975) (three-judge court).

[19] *See, e. g.,* Noise Reg. Rep. (BNA), No. 158, at A-3 (1980); *id.,* No 162, at A-8 to A-10 (1980).

As we read *City of Burbank,* Congress has preempted only local regulation of the source of aircraft noise. Local governments may adopt abatement plans that do not impinge on aircraft operations.[20] *See Air Transp. Ass'n of America v. Crotti,* 389 F.Supp. 58, 64–65 (N.D. Cal.1975) (three-judge court) (erection of noise abatement structures and monitoring of aviation noise are permissible).

The *City of Burbank* Court spoke only of noise "control" preemption, 411 U.S. at 633, 638, 93 S.Ct. at 1859, 1862, not preemption of the entire field of aviation noise abatement. *See* U. S. Dep't of Transp., Federal Aviation Admin., Aviation Noise Abatement Policy 34 (1976). Section 611(d)(2) of the Federal Aviation Act of 1958, 49 U.S.C. § 1431(d)(2) (1976), relied upon in *City of Burbank,* authorizes the FAA to "consult with . . . Federal, State, and interstate agencies" regarding noise control.

This interpretation of *City of Burbank* is consistent with its underlying rationale. The court acknowledged that "[c]ontrol of noise is of course deep-seated in the police power of the states," 411 U.S. at 638, but recognized that effective control of aircraft source noise is presumptively a subject for uniform federal regulation.

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[20] *See, e. g.,* S.Rep.No. 1353, 90th Cong., 2d Sess. 7 (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 2698, 2694 ("Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.") Against this background, the Quiet Communities Act continues the joint participation alluded to. *But see* Aviation Safety and Noise Abatement Act of 1979, Pub.L. 96–193, § 107, 94 Stat. 53 (1980) (to be codified in 49 U.S.C. § 2107) (indicating increased federal regulation).

See, *e. g., id.* at 625, 627–28, 639, 93 S.Ct. at 1855, 1856–57, 1862. *See also National Aviation v. City of Hayward,* 418 F.Supp. 417, 425 n.13 (N.D.Cal. 1976).

As the Court in *City of Burbank* noted, Congress foresaw that local regulation of airspace use and the sources of aviation noise would "severely limit the flexibility of FAA in controlling air traffic flow," 411 U.S. at 639, 93 S.Ct. at 1862, and would "increase congestion, cause a loss of efficiency, and aggravate the noise problem." *Id.* at 628, 93 S.Ct. at 1857.[21]

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[21] Despite these considerations, CalTrans argues that the agencies entrusted by Congress to regulate aircraft noise have abdicated their duties, thus removing *City of Burbank's* predicate of pervasive federal regulation. In the void purportedly so created, CalTrans asserts state regulation may occur. We find this argument without merit from both factual and theoretical points of view.

In 1976, for example, the United States Department of Transportation issued its report on federal aviation noise abatement policy. It stated: "The federal government has preempted the areas of airspace use and management, air traffic control, safety and the regulation of *aircraft noise at its source,*" U. S. Dep't of Transp., Federal Aviation Admin., Aviation Noise Abatement Policy 34 (1976) (emphasis added) [(hereinafter "Noise Abatement Policy")].

The same report concluded that "[s]tate and local governments may protect their citizens through land use controls and other police power measures *not affecting aircraft operations.*" *Id.* (emphasis added). *See also id.* at 31–32.

CalTrans argues, however, that this report adopts the dictum from *Air Transp. Ass'n of America v. Crotti,* 389 F.Supp. 52 (N.D.Cal. 1975) (three-judge court) to the effect that states may use their police power to coerce political subdivisions to use proprietary powers. *See id.* at 64 n.2; Noise Abatement Policy, *supra,* at 33.

The correct interpretation of this language from *Crotti* is discussed below, *see* pp. 1314–1316 *infra.* The main point, however, is that this asserted state authority to coerce is nowhere mentioned in those sections of the report which outline the differing functions of proprietors and local governments. *See* Noise Abatement Policy, *supra,* at 34.

Other federal agencies have agreed with the report's conclusion that direct control of the source of aircraft noise is federally preempted. *See* Environmental Protection Agency, Model Noise

It was but a short step from these findings to the holding that local regulation of the source of aircraft noise was preempted.[22]

In *Air Transp. Ass'n of America v. Crotti,* 389 F.Supp. 58 (N.D.Cal.1975) (three-judge court), the regulatory scheme at issue here was attacked as facially invalid by

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Control Ordinance § 6.2.8(b) (1979); Environmental Protection Agency, Report on Aircraft-Airport Noise to the United States Senate Committee on Public Works, 93d Cong., 1st Sess. 56–59, 96–97 & 105 (1973); Civil Aeronautics Bd., Implementation of Preemption Provisions of the Airline Deregulation Act of 1978), 44 Fed.Reg. 9948, 9951 (1979).

CalTrans is not helped even if we accept the factual validity of its initial assertion. It falls considerably short of undercutting the regulatory predicate of *City of Burbank* so as to override the presumption of continued validity that we must accord to the definitive interpretation of federal statutes by the Supreme Court.

[22] The proposition that the federal government has preempted the area of flight control regulation to eliminate or reduce noise has been accepted without contrary authority by numerous courts which have addressed the subject. *See City of Blue Ash v. McLucas,* 596 F.2d 709, 712 (6th Cir. 1979); *British Airways Bd. v. Port Authority of New York,* 558 F.2d 75, 83–85 (2d Cir. 1977); *National Aviation v. City of Hayward,* 418 F.Supp. 417, 420–21 (N.D.Cal.1976); *Air Transp. Ass'n of America v. Crotti,* 389 F.Supp. 58, 62 (N.D.Cal.1975) (three-judge court); *Wood v. City of Huntsville,* 384 So.2d 1081, 1083–84 (Ala.1980); *Greater Westchester Homeowners Ass'n v. City of Los Angeles,* 26 Cal.3d 86, 93–97, 160 Cal.Rptr. 733, 603 P.2d 1329 (1979), *cert. denied,* _____ *U.S.*_____, *101 S.Ct. 77, 66 L.Ed.2d 22 (1980); San Diego Unified Port Dist. v. Superior Court,* 67 Cal.App.3d 361, 366–69, 136 Cal.Rptr. 557, *cert. denied,* 434 U.S. 859, 98 S.Ct. 184, 54 L.Ed.2d 132 (1977); *Aaron v. City of Los Angeles,* 40 Cal.App.3d 471, 487–91, 115 Cal.Rptr. 162 (1974), *cert denied,* 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975); *Village of Bensenville v. City of Chicago,* 16 Ill.App.3d 733, 306 N.E.2d 562 (1973); *Opinion of the Justices,* 359 Mass. 778, 271 N.E.2d 354 (1971); *Marshall v. Consumers Power Co.,* 65 Mich.App. 237, 237 N.W.2d 266 (1975) (dicta); *Garden States Farms, Inc. v. Bay,* 77 N.J. 439, 390 A.2d 1177 (1978); *Township of Hanover v. Town of Morristown,* 135 N.J.Super. 529, 343 A.2d 792 (1975).

virtue of federal preemption. The court invalidated some provisions and let others stand, reserving for a later date their validity as applied.[23] *Id.* at 65.

Brief discussion of three points in the district court decision illustrates its consistency with the result we reach.[24] It used the distinction between direct and in-

[23] The court invalidated single event noise level standards [SENEL], which imposed penalties on the owner of any aircraft that exceeded a preset noise level. *See Air Transp. Ass'n of America v. Crotti,* 389 F.Supp. 58, 65 (N.D.Cal. 1975) (three-judge court). The standards were to be enforced by the counties where the transgression took place. *Id.* at 62; Cal.Pub.Util. Code § 21669.4 (West Supp. 1981).

[24] We give weight to the reasoning of the *Crotti* decision to the extent it is persuasive, but it does not bind us. In any event, we find *Crotti* fully consistent with our analysis.

When a district court is convened as a statutory three-judge panel, it still is sitting as a district court for purposes of stare decisis. *Lewis v. Rockefeller,* 431 F.2d 368, 371 (2d Cir. 1970). The distinctive purpose of a three-judge court as it was conceived and for most of the existence of its statutory authorization was not to add a greater than normal authority or finality to its decision, but rather to ensure that any decision that may enjoin enforcement of statutes be made after more extensive and considered deliberation than a single district judge might have the opportunity to undertake. *See* P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 967–79 (2d ed. 1973); D. Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U.Chi.L.Rev. 1 (1964).

An unappealed decision of a statutory three-judge court has the same precedential weight for other courts of the district or circuit as any district court decision. *Farley v. Farley,* 481 F.2d 1009, 1012 (3d Cir. 1973); *United States v. Crosson,* 462 F.2d 96, 102 (9th Cir.), *cert. denied,* 409 U.S. 1064, 93 S.Ct. 569, 34 L.Ed.2d 517 (1972); *Russell v. Hathaway,* 423 F.Supp. 833, 835 (N.D.Tex. 1976) (three-judge court); *Mazer v. Weinberger,* 385 F.Supp. 1321, 1324 n.4 (E.D.Pa.1974), vacated on other grounds, 422 U.S. 1050, 95 S.Ct. 2671, 45 L.Ed.2d 704 (1975) (three-judge court); 1B J. Moore, Moore's Federal Practice ¶0.402[1] n.29 (1980 & Supp. 1980–81).

Because of the parties' extensive discussion of *Crotti,* we add these remarks and those in text to explain why the decision is not binding on this appeal and why our holding is fully consistent with *Crotti.*

direct control of aircraft noise to invalidate California's attempt at direct noise regulation. *Id.* at 64–65. Other regulations permitted proprietors to choose a variety of methods to reduce noise. Although a curfew was one option, it was not specifically mandated as it has been here.[25] The court stated that efforts to impose curfews via the state's police power might be suspect but, since the program did not unambiguously require this, it refrained from ruling on the matter. *Id.* at 65.

Finally, the court observed in a footnote that the power of states to regulate political subdivisions was well established. *Id.* at 64 n.2. CalTrans places inordinate interpretive weight on this dictum.

The observation that a state has a power in no way implies any doubt about equally well-settled limits to that power, such as federal preemption. The *Crotti* decision nowhere intimidated that the power to regulate subdivisions was unlimited by the Constitution. *Cf. National Aviation v. City of Hayward,* 418 F.Supp. 417, 421 (N.D.Cal.1976) ("it seems clear that if this [curfew] was passed by a state . . . not the proprietor of the airport, it would run afoul of *Burbank* . . . .").

Our analysis of the pertinent state and federal regulations leads us to conclude that the curfew imposed by condition four impinges on airspace management by

[25] In *Crotti,* the state argued in its brief, made part of the record in this case, that the regulations were not mandatory upon proprietors, but only suggestive. As the state put it, "[S]hould a proprietor choose to act using its unpreempted powers . . . that is the business of the proprietor. The state has nowhere directed that proprietary power be used."

directing when planes may fly in the San Diego area, *City of Burbank,* 411 U.S. at 627, 639, 93 S.Ct. at 1856, 1862, and on federal control of aircraft noise at its source by restricting the permissible flight times of planes solely on the basis of their noise emissions. *Id.* at 633, 638, 93 S.Ct. at 1859, 1862. The state has attempted to act in an area preempted by the federal government and its actions are void.

It is asserted, however, that even if *City of Burbank* is still a correct statement of federal policies, CalTrans fits within a recognized exception to its holding. We next consider that argument.

### III. *City of Burbank's* Proprietor Exemption

[6] The *City of Burbank* Court recognized that Congress singled out airport proprietors and gave them special, although undefined, leeway in controlling the sources of aircraft noise directly. *City of Burbank,* 411 U.S. at 635–36 n.14, 93 S.Ct. at 1860–61 n.14. *See Santa Monica Airport Ass'n v. City of Santa Monica,* 647 F.2d 3 (9th Cir. 1981).

CalTrans asserts it is a proprietor of Lindbergh Field and that the proprietor exception is broad enough to encompass CalTrans' regulations. We need not address the scope of the exception as CalTrans is not a proprietor within the meaning of *City of Burbank.*

The origin of the proprietor exemption appears in a letter by the Secretary of Transportation addressed to the Senate Commerce Committee regarding the 1968 amendments to the Federal Aviation Act. The letter, concurred in by the Committee, stated in part that the

"proposed legislation . . . will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations." S.Rep.No.1353, 90th Cong., 2d Sess. 7 (1968), *reprinted in* [1968] U.S.Code Cong. & Ad.News 2688, 2693.

The rationale for this exception is clear. Since airport proprietors bear monetary liability for excessive aircraft noise under *Griggs v. Allegheny County,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962), fairness dictates that they must also have power to insulate themselves from that liability.[26] But before an entity may possess this power, it must bear the responsibility, either actual or potential, for excessive aircraft noise.[27]

It has not been demonstrated that, under the current allocation of powers, CalTrans would be liable for excessive aircraft noise from Lindbergh Field under *Griggs.* There, the question was whether the county, as owner and operator of an airport, was liable for uncompensated takings of air easements necessary for the airport's oper-

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[26] *British Airways Bd. v. Port Authority of New York,* 558 F.2d 75, 83 (2d Cir. 1977); *Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667, 674 n.8 (9th Cir. 1972), *aff'd* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); Noise Abatement Policy, *supra* note 21, at 32, 50. *See also* 34 Fed.Reg. 18,355 (1969); S.Rep.No.1353, 90th Cong., 2d Sess. 7 (1968), *reprinted in* [1968] U.S. Code Cong. & Ad.News 2688, 2693.

[27] As stated in the Noise Abatement Policy, *supra* note 21, at 50:
The airport proprietor is closest to the noise problem, with the best understanding of both local conditions, needs and desires, and the requirements of the air carriers and others that use his airport. The proprietor must weigh the costs the airport and the community must pay for failure to act, and consider those costs against any economic penalties that may result from a decision to limit the use of the airport through curfews or other restrictions for noise abatement purposes.

ation. The other candidate for liability was the United States, due to its control of all navigable airspace. The Court found that the county was liable for the easements. 369 U.S. at 89, 82 S.Ct. at 533.

Among the bases given in *Griggs* for constitutional liability, or proprietorship for *City of Burbank* purposes, were the county's ability to obtain the necessary approach easements,[28] and its status as promoter, lessor, and operator of the airport.[29] *Griggs,* 369 U.S. at 89, 82 S.Ct. at 533.

These criteria (ownership, operation, promotion, and the ability to acquire necessary approach easements) comprise a federal definition of proprietors for preemption purposes. To the extent that state law provides these qualities, we inquire into the Port District's status under state law.

The California Legislature created the Port District in 1962. San Diego Unified Port District Act, 1962 Cal.Stats., Ch. 67, 1st Ex. Sess., *codified in* Cal.Harb. & Nav.Code, App. I (West 1978 & Supp. 1981). The Act granted the Port District power to: operate and promote

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[28] *See British Airways Bd. v. Port Authority of New York,* 564 F.2d 1002, 1011 (2d Cir. 1977); *Kirk v. United States,* 451 F.2d 690, 694 (10th Cir. 1971), *cert. denied,* 406 U.S. 963, 92 S.Ct. 2059, 32 L.Ed.2d 350 (1972).

[29] *See also Lenoir v. Porters Creek Watershed Dist.,* 586 F.2d 1081, 1094–95 (6th Cir. 1978); *Town of East Haven v. Eastern Airlines, Inc.,* 331 F.Supp. 16, 30–32 (D.Conn.1971); *Loma Portal Civic Club v. American Airlines, Inc.,* 61 Cal.2d 582, 585 n.1, 39 Cal.Rptr. 708, 394 P.2d 548 (1964). *Griggs* has been criticized. *See, e.g.,* Note, *Shifting Aircraft Noise Liability to the Federal Government,* 61 Va.L.Rev. 1299 (1975); Note, *Aircraft Noise Abatement; Is There Room for Local Regulation?,* 60 Cornell L.Rev. 269 (1975).

an air terminal, *id.* § 4, govern itself, *id.* § 21, sue and be sued, *id.* § 23, hold real property and make contracts, *id.* §§ 25, 31, condemn private property for public uses, *id.* § 21, as well as tax property for Port District purposes, *id.* §§ 41, 45, 49.5.

California has also granted the Port District power to acquire air easements to alleviate the effect of aircraft noise on local residents.[30] Further, should the Port District desire to expand or begin new construction, the state provides for a limited relocation and compensation program for affected area residents.[31]

Under state law then, the Port District is the owner, operator, and promoter of San Diego Airport. It has the power to acquire air easements for the airport's use and may be sued in its own right. In short, it bears every earmark of proprietorship as recognized in *City of Burbank.*

The state concedes this, but denies that the above analysis establishes the Port District as the *sole* proprietor of the airport facility.[32]

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[30] Cal.Pub.Util.Code § 21652 (West Supp. 1981); Cal.Code Civ.Proc. § 1240.110 (West Supp. 1981); Senate Legislative Committee Comment to Public Utilities Code section 21652, *reprinted in* 58 West's Annotated California Codes, Public Utilities 120 (West Supp. 1981).

[31] Cal.Gov't Code §§ 7260–7276 (West 1980 & Supp. 1981). *Cf.* Cal. Pub.Util.Code §§ 21690.20–.29 (West Supp. 1980) (Los Angeles Airport Relocation Program).

[32] The identity of the proprietor or proprietors of Lindbergh Field has significance beyond *City of Burbank's* footnote 14. The federal government, appearing amicus curiae, desires to know who the proprietor is for its certification process under 49 U.S.C. § 1432 (1976). Section 1432 certificates are issued to airport operators who meet minimum safety standards, and enable the FAA to enforce its safety regulations. Currently, the Port District is the only entity listed as a proprietor under this certificate procedure. Clerk's Record at 685.

California contends that, by virtue of the state's inherent power over its political subdivisions, CalTrans is also a proprietor.

California's extensive grant of powers to the Port District fatally undercuts this argument. The state has seen fit to grant the Port District lands [33], the ability to sue

[33] CalTrans asserts that the tidelands on which Lindbergh Field sits are subject to a public trust of which California is both the settlor and the representative of the beneficiaries. *See City of Coronado v. San Diego Unified Port Dist.*, 227 Cal.App.2d 455, 474–75, 38 Cal.Rptr. 834 (1964), *appeal dismissed*, 380 U.S. 125, 380 S.Ct. 806, 13 L.Ed.2d 792 (1965) (per curiam).

From this premise, CalTrans makes two arguments: first, that its capacity under this trust allows it to direct the activities conducted on the land subject to the trust; and second, that the State Aeronautics Act, which authorizes the regulations at issue here, must be read as a *pro tanto* amendment of the Port District's original tidelands grant.

An inquiry into the scope of California's rights under the tidelands trust theory, *see generally, Marks v. Whitney*, 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374 (1971); Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 Urb.Law. 519 (1974), does not aid our analysis. For purposes of federal proprietorship, the key factor is *Griggs* liability. Nothing in the materials cited by CalTrans or amici indicates that the State of California, as settler and representative of the beneficiaries of the trust, bears fiscal liability for misuse of the Port District's land. At oral argument, counsel for CalTrans explicitly disclaimed such primary liability. Without such liability, however, congressional intent, as found in *City of Burbank*, precludes control under the police power, and CalTrans' argument fails.

CalTrans' *pro tanto* amendment theory suffers a similar fate. In addition to not resolving the question of *Griggs* liability, the authorities cited by CalTrans and the state are of no help. The state asserts that *People ex rel. San Francisco Bay Conservation & Dev. Comm'n v. Town of Emeryville*, 69 Cal.2d 533, 72 Cal.Rptr. 790, 446 P.2d 790 (1968), and *Mallon v. City of Long Beach*, 44 Cal.2d 199, 282 P.2d 481 (1955), stand for the proposition that any act by the state legislature automatically affects every tideland grant. While we recognize that the authority to rescind such grants remains in the legislature, *see* Eikel & Williams, *supra*, at 552–53, we find these cases inapposite.

In *Emeryville*, for example, the legislature had created a special commission especially for the administration of tidelands in the San Francisco Bay area. In upholding an injunction in favor of the special commission and against Emeryville, the titleholder

and be sued, and the power to operate and plan the airport. The district court found that, due to this delegation of authority, the state had no primary liability. 457 F.Supp. at 293–94. As the Port District is comprised of

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of the lands, the court held that the legislature retained the power to amend tideland grants when to do so would serve the "general statewide interest." 69 Cal.2d at 549, 79 Cal.Rptr. 790, 446 P.2d 790. But there the affected lands were specifically mentioned in the superseding legislation, and the result was within the intent of the legislation.

Here, by contrast, the tidelands are not mentioned in the State Aeronautics Act, nor does it appear in that act that the legislature intended to use its power over California's tidelands to achieve the objectives of the legislation.

*Mallon* involved similar facts. There, the City of Long Beach sued to recover profits from natural resources located in the tidelands. The state legislature had by state law allocated them to the state, and the California Supreme Court held that the legislature had the power to make that amendment to the initial grant of the tidelands. 44 Cal.2d at 207, 282 P.2d 481.

Neither case contains language supporting the proposition that each of the many acts of the California legislature automatically affects the terms of every tidelands grant made since 1850. The result would be utter chaos, and we do not attribute that to California's legislature.

The cases cited by CalTrans and amici are better read to stand for the proposition that legislation may specifically alter a municipality's tidelands grant. Here, the scope of the trust would not allow CalTrans to direct the Port District's activities because we have not been shown that the state legislature specifically exercised its power over the Port District's tidelands when enacting the State Aeronautics Act.

Further, the legislature addressed itself to the particular lands at issue here when it created the Port District in 1962. It said that the Port District "shall hold such lands in trust for the uses and purposes and upon the conditions which are declared in this act." Cal.Harb. & Nav. Code, App. I., § 14 (West 1978).

The uses, purposes and conditions included the "acquisition, construction, maintenance, operation, development and regulation of . . . air terminal facilities" and the promotion of "commerce, navigation, fisheries and recreation . . . ." *Id.* § 4. *See also id.* § 87. The terms of this grant have not been explicitly amended since the Port District's creation, and we decline to do so now.

five San Diego area cities,[34] California's actions have passed any potential aircraft noise liability from all of the state's residents to the residents of these five constituent cities.

*City of Burbank's* proprietor exception looks to who will pay for the taking of air easements. The state, through the Port District Act, has unequivocally stated that the Port District and the residents of its constituent cities will foot the bill.[35] Since CalTrans bears no liability for excessive aircraft noise at Lindbergh Field, it is not now a proprietor under federal law, and cannot avail itself of *City of Burbank's* footnote 14.[36]

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[34] The cities of Chula Vista, Coronado, Imperial Beach and National City select one commissioner each to sit on the Port District's governing board. San Diego, due to its relative size, selects three commissioners for a total of seven. Cal.Harb.& Nav. Code, App. I, § 16 (West 1978).

[35] It may be true that California could assume liability for excessive noise at Lindbergh Field, but we deal in actualities and not possibilities. California has four methods for its political subdivisions to pay judgments, *see* Cal.Gov't Code §§ 970–991.2 (West 1980 & Supp. 1981). Absent these, a subdivision may declare bankruptcy under Chapter Nine of the Federal Bankruptcy Act to eradicate its debt. *See* 11 U.S.C. §§ 901–946 (Supp. III 1979).

Nowhere is it mandated that the state will be ultimately liable for the Port District's judgments. The Port District, without further and uncertain state action, bears alone the brunt of aircraft noise liability. As such, it is the proprietor for purposes of *City of Burbank's* footnote 14.

[36] In its reply brief CalTrans argued, for the first time, that this interpretation of federal law would render it unconstitutional under *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). CalTrans did little more than cite *National League of Cities*, however, and we are left to guess precisely what it meant to argue.

Under these circumstances we may not consider the question. *Levy v. Urbach*, ___ F.2d ___, ___ – ___n.3, No. 78-2227 (9th Cir., February 2, 1981). CalTrans' "failure to present a coherent argument removes the point from our permissible range of inquiry." *Id.*

Moreover, state law precludes the argument that CalTrans and the district are dual proprietors. Section 21632 of the California Public Utilities Code provides:

> [CalTrans] shall not acquire any airport . . . owned or controlled by a political subdivision . . . without the consent of the political subdivision.

This constitutes a procedural barrier that the state has erected to its acquisition of Lindbergh Field and, derivatively, to the assumption of proprietorship status.

CalTrans makes the final argument that, since the state could install CalTrans as operator and proprietor of Lindbergh Field by statute, the state can exercise the lesser power of assuming the proprietor's function of direct flight regulation. The argument fails because it confuses the existence of power with its exercise. The state cannot confer proprietor status on CalTrans simply by a course of dialectics when its own political system forbids that result.

The judgment is AFFIRMED.

# APPENDIX B

## APPENDIX B

FILED
SEP 21 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

SAN DIEGO UNIFIED PORT DISTRICT,
*Plaintiff-Appellee,*
*and*

AIR TRANSPORT ASSOCIATION OF AMERICA, et al.,
*Intervening Plaintiffs-Appellees,*
vs.

ADRIANA GIANTURCO, et al.,
*Defendants-Appellants.*

No. 78-3260

ORDER

Before: WRIGHT and TANG, Circuit Judges, and CURTIS, Senior District Judge.

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The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Tang have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

# APPENDIX C

## APPENDIX C

**SAN DIEGO UNIFIED PORT DISTRICT, Plaintiff,**

**Air Transport Association of America et al., Plaintiffs-in-Intervention,**

**v.**

**Adriana GIANTURCO, Director of Transportation of the State of California, Edwin J. McKenney, Chief of the Division of Aeronautics of the Department of Transportation of the State of California, and the Department of Transportation of the State of California, Defendants.**

**Civ. No. 78-97-S.**

United States District Court,
S. D. California.

Aug. 30, 1978.

### OPINION

EDWARD J. SCHWARTZ, Chief Judge.

This is an action for declaratory and injunctive relief initially brought by the San Diego Unified Port District ("Port District") against the California Department of Transportation and two of its officers (collectively referred to as "Department"). The focus in the litigation is San Diego International Airport, Lindbergh Field, which is owned and operated by the Port District. The Department seeks to impose an extended curfew at Lindbergh Field which the Port District contends is unconstitutional.

The parties have raised numerous issues which require extended consideration.

***FACTS***

***General Background***

In 1969 the California Legislature enacted legislation directing the Department of Aeronautics (now the Department of Transportation) to adopt noise standards for airports operating under a state permit. Cal. Pub.Util.Code § 21669 *et seq.* (West Supp. 1978). Pursuant to this statutory authorization, the Department subsequently adopted "noise standards" which now appear at 21 Cal.Admin.Code §§ 5000–5080.5.

The regulations adopted by the Department seek to achieve a gradual reduction in the amount of noise generated by aircraft take-offs and landings at California airports. The regulations establish what is known as a Community Noise Equivalent Level (CNEL). CNEL regulations provide a method for computing on a 24-hour basis an average noise exposure level. A cumulative analysis takes into account the total noise generated by aircraft "events" over a given period of time. The regulations require that, in graduated steps, no airport is to have a "noise impact boundary" containing "incompatible land use" in excess of 65 dB on the CNEL scale by 1985.

The CNEL regulations require an airport operator to operate its airport so as not to exceed the applicable CNEL noise level. Cal.Admin.Code § 5062. An operator unable to comply with the Noise Standards may apply to the Department for a variance. Cal.Admin.Code § 5075. As a practical matter, the Noise Standards are so stringent that each of the major airports in California, includ-

ing Lindbergh Field, apparently must apply for a variance as a matter of routine.

***Lindbergh Field's Variance Applications***

The Port District, as proprietor of Lindbergh Field, filed its first application for a variance from the Noise Standards on January 24, 1975. Hearings were held before an administrative law judge on September 2–4, 1975. While this application was pending, on December 2, 1975, the Port District's Board of Port Commissioners adopted a resolution which imposed a curfew on most jet landings and take-offs between the hours of 12:00 midnight and 6:00 a.m. A proposed decision on the variance application by the administrative law judge was adopted by the Department of Transportation on January 19, 1976. The variance was granted for a period of one year subject to certain restrictions, one of which was the following:

> 2. Respondent San Diego Unified Port District shall diligently pursue every avenue to ensure that aircraft which fail to meet the FAR 36 requirements do not use the field for take-offs or landings during the hours from 11:00 p.m. until 7:00 a.m. each day. In this connection respondent will negotiate with the respective airlines in an effort to refrain scheduling nighttime flights. In all future contracts with air carriers, respondent shall require that aircraft not meeting the FAR 36 standards will not be used during the 11:00 p.m. to 7:00 a.m. hours. Respondent shall use its best efforts in urging the FAA to adopt a policy consistent with the restriction of nighttime flights which do not meet the FAR 36 standards. . . .

The Port District's second variance application was

filed on January 14, 1977. Once again, an administrative law judge conducted hearings on this application. His proposed variance decision was adopted by the Department of Transportation on January 17, 1978.

This variance, like its predecessor, was granted subject to certain restrictions and conditions. The key condition, now challenged in this court, provides in pertinent part as follows:

> 4. Respondent San Diego Unified Port District is to retain the existing curfew which currently prohibits take-offs and landings by commercial air carriers between the hours of 12 midnight and 6:00 a.m. Respondent is to extend this existing curfew to the extent that commercial air carriers will not be permitted to take off between the hours of 11:00 p.m. and 7:00 a.m. and commercial air carriers will not be permitted to land between the hours of 11:00 p.m. and 7:00 a.m. unless such aircraft meet FAR part 36 requirements. . . .

***Procedural Posture of this Litigation***

Following the granting of the second variance, the Port District brought this action to have Condition 4—the "curfew condition"—declared unconstitutional. On March 13, 1978, the court heard argument on the Port District's motion for a preliminary injunction. The court denied the motion without prejudice, ruling that the Port District should first apply to the Federal Aviation Administration (FAA) for a determination as to whether the curfew extension would be unjustly discriminatory or detrimental to the National Air Transportation System.[1]

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[1] The court ruled that because of a provision contained in Condition

Immediately thereafter, the Port District followed the court's directive and applied to FAA for review of the curfew extension. Full background information was provided to FAA by both the Port District and the Department to facilitate review. In addition, FAA solicited and received information from various interested parties, including the Air Transport Association of America. On July 20, 1978, FAA advised both the Port District and the Department that it had completed its review of the matter. FAA indicated it would not provide any response and that no written statement concerning its review would be forthcoming.

Having exhausted its administrative remedies, the Port District looked again to this court for relief. In the face of threats by the Department that it would terminate the noise variance unless the Port District complied with Condition 4 and extended the Lindbergh Field curfew, the Port District applied for a temporary restraining order on July 28, 1978. The court granted the Port District's application.

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4, the Port District had not exhausted its administrative remedies. The provision referred to provides as follows:

> The curfew shall be extended as described within 120 days of the effective date of this order unless respondent [Port District] secures from the Federal Aviation Administration a written determination with supporting factual findings that the Federal Aviation Administration has determined the proposed curfew extension to be unjustly discriminatory or detrimental to the National Air Transportation System. Respondent shall submit its request to the Federal Aviation Administration for review within sixty days of the effective date of this order and such request shall contain all of the information required by the Aviation Noise Abatement Policy of November 18, 1976. The Department of Transportation for good cause shown may grant an extension of the above time periods.

On August 21, 1978, the court granted leave to the Air Transport Association of America and various commercial airline companies to intervene as plaintiffs in the litigation. The court then heard argument on motions by the Port District and intervenors for a preliminary injunction and the Department's motion for summary judgment. We now turn to a discussion of these motions.

***PRELIMINARY INJUNCTION***

[1] In this circuit, a party seeking a preliminary injunction must satisfy one of two alternate tests to establish his entitlement to such relief. The first test requires a showing of probable success on the merits combined with the possibility of irreparable injury. The second test requires the applicant to demonstrate that serious questions are raised and that the balance of hardships tips sharply in his favor. *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975). In this case, the Port District and intervenors are entitled to a preliminary injunction under either test.

**A. *First Test***

**1. *Irreparable Injury***

[2] As noted above, Condition 4 of the variance requires the Port District to lengthen the curfew now in effect from six to eight hours. The Port District and intervenors have established to the court's satisfaction that they will be irreparably injured if they are required to comply with this condition while the litigation is pending.

The likelihood of irreparable injury can best be under-

stood by highlighting the problems and conflicting demands faced by Lindbergh Field. The airport is located in a central area of San Diego, only minutes from the downtown business district, hotels and motels, and tourist attractions. While the airport is most convenient in terms of its location, this convenience carries a high price. Lindbergh Field is surrounded by heavily populated residential areas. The noise generated by aircraft activity at Lindbergh Field has been, for many years, a source of great annoyance to nearby residents. Frequently, the airport and airlines which use the airport have found themselves defending noise-related lawsuits brought by these residents. Pressure often has been exerted on the Port District by various organizations to do something about the airport noise problem.

At the other end of the spectrum is a substantial segment of the community which believes air service in and out of San Diego should be developed more fully. These people have pressed the airport to increase its level of service so that San Diego can become a national center of tourism and commerce. They have argued, often successfully, that the San Diego community needs a high level of air service to maintain a strong economy.

To satisfy these conflicting demands, the Port District has chosen a middle course. By instituting a 12:00 midnight to 6:00 a.m. curfew on most jet take-offs and landings, the Port District has attempted to reduce the total amount of noise generated by airport operations. This curfew was instituted over the objection and threatened non-compliance of the airlines which use the airport.

With this voluntary curfew, the Port District has achieved a delicate balance between the concerns of airport-area residents, the needs of the San Diego community as a whole, and the requirements of the airlines. It is doubtful that this balance between competing interests could be maintained if the Port District were forced to adopt the longer curfew advocated by the Department.

Irreparable harm is further evidenced by the fact that the Department has threatened to revoke the noise variance because the Port District has not complied with Condition 4. After FAA notified the parties that it would provide no response concerning its review of the curfew, the Department informed the Port District that proceedings to revoke the noise variance would be initiated unless the Port District's Board of Port Commissioners immediately adopted an extended curfew. It was for this reason that the Port District was granted a temporary restraining order by the court. If a preliminary injunction is denied, the Department will again be in a position to revoke the noise variance for the Port District's failure to comply with Condition 4.

There are additional ways in which the Port District and intervenors will be irreparably harmed if a preliminary injunction does not issue. Affidavits filed with the court by airport and airline personnel demonstrate that an extended curfew will require the airport to cut back the quantity and quality of air service provided to the community. Moreover, the airlines will be forced to adjust their flight schedules and cancel some flights alto-

gether. The effects of such action will be felt not only in San Diego, but in other cities across the nation where connecting flights will be disrupted. The inevitable result will be increased costs, decreased revenues, and loss of goodwill.

As a final point on the question of irreparable harm, the court believes that the Port District and intervenors ultimately will succeed on the merits of this case. If the Port District is denied a preliminary injunction, but eventually prevails on the merits in its challenge to the curfew condition, the Port District will have no choice but to extend its curfew during the pendency of the litigation. Requiring the Port District to extend its curfew for such a limited time would magnify the various problems noted above. Such a result would be unfair and unreasonable.

In sum, it appears that the kind of harm the Port District and intervenors will sustain in the absence of a preliminary injunction is not readily translatable into dollar amounts. Therefore, the Port District and intervenors have demonstrated the required showing of irreparable harm.

**2. *The Merits***

The principal basis for this action is the Port District's contention that Condition 4 of the noise variance is unconstitutional because it invades a field preempted by federal law. Before we can reach this constitutional argument, certain jurisdictional and procedural points raised by the Department must be addressed.

***a. Eleventh Amendment***

The first objection to the court's jursidiction is raised by the Department's contention that this is a suit against a state which is barred by the Eleventh Amendment.

[3, 4] The Eleventh Amendment generally "acts as a jurisdictional bar to suits brought against state governments in the federal courts." J. Nowak, R. Rotunda, & J. Young, *Handbook on Constitutional Law* 48 (1978). The Supreme Court has held that the Amendment protects a state from federal court suits by its own citizens as well as by citizens of other states. *Hans* v. *Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *see Parden* v. *Terminal R. Co.,* 377 U.S. 184, 186, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). Despite the general immunity conferred by the Eleventh Amendment, however, its protective shield is not absolute. Based on the landmark decision of the Supreme Court in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the federal courts have preserved for themselves the power "to enjoin state officials to conform their conduct to the requirements of federal law." *Milliken* v. *Bradley,* 433 U.S. 267, 289, 97 S.Ct. 2749, 2762, 53 L.Ed.2d 745 (1977). Thus, the Eleventh Amendment poses no bar to prospective injunctive relief against unconstitutional state action. *Milliken* v. *Bradley, supra; Edelman* v. *Jordan,* 415 U.S. 651, 668, 677, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Although the Department acknowledges the rule of *Ex parte Young,* it suggests that *Ex parte Young* has no application here. It contends that the Port District and intervenors enjoy no constitutional right which is being invaded by Condition 4. This argument cannot stand in

light of the Supreme Court's recent decision in *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978). In *Ray,* two companies involved in the refinement and transportation of oil challenged the constitutionality of a Washington state law which regulated the design, size and movement of oil tankers in Puget Sound. Plaintiffs contended that the Washington law violated the Supremacy Clause, Art. VI, cl. 2, of the Constitution. In a footnote, the Supreme Court rejected the state defendants' claim of immunity under the Eleventh Amendment.

> The state defendants challenged the District Court's jurisdiction over them, asserting sovereign immunity under the Eleventh Amendment. They recognized that in *Ex parte Young,* 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908), the Court held that the Eleventh Amendment does not bar suit in federal court against a state official for the purpose of obtaining an injunction against his enforcement of a state law alleged to be unconstitutional, but urged the District Court to overrule that decision or to restrict its application. The District Court declined to do so. The request is repeated here, and we reject it.

*Ray* v. *Atlantic Richfield Co., supra,* 435 U.S. at 156 n.6, 98 S.Ct. at 994.

[5] Based on this statement in *Ray,* it is apparent that the Eleventh Amendment will not bar a federal court suit for injunctive relief against state officers whose action is alleged to be unconstitutional by virtue of the Supremacy Clause. The Port District and intervenors here stand in precisely the same position as the plaintiffs

in *Ray*. Further, the fact that the Port District and intervenors are not challenging the constitutionality of the noise standards legislation itself but are attacking the constitutionality of action taken by the Department pursuant to the legislation makes no difference as far as the Eleventh Amendment is concerned. There is no authority for the position advanced by the Department that the underlying legislation itself must be challenged before the rule of *Ex parte Young* comes into play. *See Greene* v. *Louisville & Interurban R. Co.*, 244 U.S. 499, 507, 37 S.Ct. 673, 61 L.Ed. 1280 (1917); *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 390, 14 S.Ct. 1047, 38 L.Ed. 1014 (1894).

b. *Port District's Legal Capacity to Sue the Department*

As a second objection to the court's jurisdiction, the Department urges that the Port District lacks the legal capacity to maintain this action. In the Department's view, the Port District is a political subdivision of the State which has no authority to challenge regulatory actions taken by another agency pursuant to state legislation. This argument can be placed under any one of three headings: lack of a case or controversy, lack of a substantial federal question, or lack of standing.

The basis for this argument is the Supreme Court's holding in *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933):

> A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.

Citing the *Williams* decision, Professors Wright, Miller and Cooper have made the following observation concerning the constitutional rights of political subdivisions:

> Political subdivisions of states have been held to lack constitutional rights against the creating state, a conclusion that is at times translated into a lack of standing to challenge state policies.

13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531, at 234 (1975).

The Department's contention that the Port District's status as a political subdivision bars this suit is unpersuasive. First, even if the Department is correct that a political subdivision cannot maintain the instant type of action, the intervenors are private parties which clearly can maintain such a suit. As a practical matter, dismissing the Port District would not affect the vitality of the suit because the intervenors would continue to press their similar constitutional claims.

[6] More important, it has not been persuasively demonstrated that a political subdivision cannot maintain a constitutional challenge to state action based on the Supremacy Clause. The authority relied upon by the Department establishes beyond doubt that the protections afforded by the Fourteenth Amendment and the Contract Clause do not extend to political subdivisions. *E. g., City of Trenton* v. *State of New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *City of Newark* v. *State of New Jersey,* 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); *Williams* v. *Mayor of Baltimore, supra.* Thus, a political subdivision cannot bring suit against a state

based on the Fourteenth Amendment or the Contract Clause. The Department cites no authority for the proposition that an action brought by a political subdivision against a state based on the Supremacy Clause is similarly barred. The Port District, on the other hand, cites a number of cases in which political subdivisions have been permitted to maintain Supremacy Clause challenges to state action. *Triplett* v. *Tiemann,* 302 F.Supp. 1239 (D.Neb.1969); *Carlsbad Union School District of San Diego County* v. *Rafferty,* 300 F.Supp. 434 (S.D.Cal.1969); *Douglas Independent School District No. 3* v. *Jorgenson,* 293 F.Supp. 849 (D.S.D.1968); *Hergenreter* v. *Hayden,* 295 F.Supp. 251 (D.Kan.1968).

[7] The reason for distinguishing between constitutional challenges based on the Supremacy Clause and challenges based on other constitutional provisions lies in the purpose of the Supremacy Clause. The Supremacy Clause mandates that "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S.Const., Art. VI, cl. 2. This provision forbids state regulation which conflicts with federal law. It establishes a structure of government which defines the relative powers of states and the federal government. The Supremacy Clause does not confer a "right" on any individual, but it does impose a general limitation on state power.

Other constitutional provisions, unlike the Supremacy Clause, do confer fundamental rights on individual citizens. The Fourteenth Amendment, for example, guarantees that all citizens enjoy equal protection of the laws

and due process of law. These are not structural limitations on government power in the Supremacy Clause sense, but they are rights given to individual citizens which limit governmental power generally. Such rights accrue to individual citizens, not to units of government. Consequently, political subdivisions have no legitimate basis for asserting constitutional rights which are intended to limit governmental action vis-a-vis individual citizens.

If the Supremacy Clause is to be effective in achieving its purpose, its dictates must be enforceable by political subdivisions of states as well as by individuals. Political subdivisions can be profoundly affected by state action which conflicts with federal law. If political subdivisions were prevented from challenging preempted state legislation and regulation, such legislation and regulation often would go unchecked even though expressly prohibited by the Constitution. It makes no sense to prevent subdivisions of state government from acting to ensure state compliance with the commands of a constitutional provision that establishes the basic federal system of our government.

***c. Preemption***

We turn now to the crucial issue in the case: Is Condition 4 of the state noise variance unconstitutional because it invades a field preempted by federal law?

The Port District and intervenors rely on *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), to support their contention of preemption. In *Burbank*, the proprietor of the

Hollywood-Burbank Airport sought an injunction against a Burbank city ordinance which imposed an 11:00 p.m. to 7:00 a.m. curfew on take-offs by jet aircraft. The ordinance made it unlawful for jet aircraft to take off from the airport during the curfew and for the operator of the airport to allow such aircraft to take off from the airport during the curfew. The Supreme Court held that the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, as amended by the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.*, establishes a pervasive scheme of federal regulation of aircraft noise, preempting state and local control. As a result, the Burbank city ordinance was declared unconstitutional under the Supremacy Clause.

To reach this conclusion, the *Burbank* Court carefully analyzed the structure and legislative history of the Federal Aviation Act of 1958 and the Noise Control Act of 1972. The Court found the detailed and comprehensive nature of the legislation constituted a "comprehensive scheme of federal control of the aircraft noise problem." 411 U.S. at 629, 93 S.Ct. at 1857. Especially persuasive were statements contained in committee reports and statements made during floor debates on the 1972 Act. Writing for the Court, Mr. Justice Douglas summed up the import of the 1958 and 1972 statutes as follows:

> Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. . . . The interdependence of these factors requires a uniform and exclusive system of federal

> regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

411 U.S. at 638–39, 93 S.Ct. at 1862. Finally, the Court's opinion makes this telling observation:

> We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If the change is to be made, Congress alone must do it.

411 U.S. at 640, 93 S.Ct. at 1863.

[8] To avoid the *Burbank* decision, the Department suggests that the situation presented by the instant case falls within the "proprietary" exception to *Burbank*. The courts recognize that an airport proprietor may restrict the use of its facilities on the basis of noise considerations without running afoul of the preemption doctrine. *British Airways Bd. v. Port Authority of New York,* 558 F.2d 75 (2d Cir. 1977); *National Aviation v. City of Hayward,* 418 F.Supp. 417 (N.D.Cal.1976). The role of airport proprietors in developing noise abatement programs has been endorsed by the FAA, *see* Dept. of Transportation, Aviation Noise Abatement Policy 34 (Nov. 18, 1976), and the Supreme Court has declined to hold that Congress has preempted the field of noise regulation to the exclusion of airport proprietors. *City of Burbank v. Lockheed Air Terminal Inc., supra,* 411 U.S. at 635 n.14, 93 S.Ct. 1854. Thus, an airport proprietor remains free to impose curfews on aircraft activity at its airport. *National Aviation v. City of Hayward, supra.* Courts have permitted proprietors this regulatory leeway because the proprietor is liable for compensable takings due to noise from overflying commercial aircraft. *Griggs v. Allegheny*

*County,* 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). Consequently, it has been assumed that "the operator will act in a rational manner in weighing the commercial benefits of proposed service against its costs, both economic and political." *British Airways Bd. v. Port Authority of New York, supra,* 558 F.2d at 83.

[9] The Department would have the court believe this case involves nothing more than an airport proprietor adopting an extended curfew. The Department denies it has "directed" the Port District to impose a curfew as was true in *Burbank,* but suggests rather that it has merely "conditioned" the granting of a noise variance upon compliance with a curfew condition. The Department sees this as a case where the decision whether to impose a longer curfew will be made by the Port District, not by the Department.

The difficulty with this portrayal is that it ignores the practical effect of the Department's action. Looking at the matter realistically, the Port District does not have any alternative to complying with Condition 4. The CNEL regulations promulgated by the Department require compliance with the applicable CNEL noise level. Cal.Admin.Code § 5062. An airport operator unable to achieve compliance must apply to the Department for a variance. Cal.Admin.Code § 5975. There does not seem to be any doubt, given Lindbergh Field's location and the present state of aircraft technology, that it is physically impossible for Lindbergh Field to comply with applicable CNEL noise standards. Indeed, the administrative law judge who conducted hearings on

the Port District's most recent variance application noted:

> Actually, Lindbergh Field will continue to have an extremely serious noise problem for a long period of time. There are no realistic solutions presently available to bring Lindbergh Field into compliance with the State Noise Standards. Operational techniques have and will produce only minimal noise reduction. . . . Even if all commercial aircraft were in compliance with the FAR 36 requirements Lindbergh Field would yet be far short of the State noise objectives . . . It is quite obvious that the noise problem is not subject to any instant solution.

Proposed Decision, In the Matter of the Statement of Issues Regarding the Application of Port of San Diego 5–6 (Dec. 9, 1977). In other words, if the Port District is to comply with state law and avoid criminal penalties, it has no choice but to seek a noise variance from the Department. Similarly, the Port District is in no position to avoid whatever conditions are attached to a variance. It must go along with what the Department wants it to do—in this case, extension of the existing curfew. In practical effect, the decision to impose an extended curfew is being dictated to the Port District by the Department. This is precisely the type of non-proprietary airport regulation which the Supreme court disallowed in *Burbank*.

In *Burbank*, Mr. Justice Douglas cautioned against the states or municipalities being permitted to interfere with the need for uniform and exclusive federal regulation over aircraft noise:

> If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.

*City of Burbank v. Lockheed Air Terminal, Inc., supra,* 411 U.S. at 639, 93 S.Ct. at 1862. This same concern must be raised again here. What the Department seeks to do here, if other states and localities do likewise, would pose very serious problems to the national network of air transportation. There is the further concern that if the Department can successfully force implementation or extension of a curfew by use of a condition attached to a variance, the door will be opened to policymakers and departments at all levels of state and local government to take a similar approach whenever they wish to control airport activity. Local and state governments should not be permitted to use variances, licenses, and permits to achieve indirectly what the Supreme Court has interdicted them from doing directly.

One additional point raised by the Department in connection with the preemption question should be mentioned. The Department asserts that a condition to a variance cannot be challenged as unconstitutional unless it can be demonstrated that the plaintiff has some constitutional right to the variance itself. Since the Department has issued a variance to the Port District, it is unnecessary to decide whether the Port District has a

constitutional right to a variance. Even assuming that the Port District is not constitutionally entitled to a variance, this does not mean that the Department can attach unconstitutional conditions to a variance that is issued. No suggestion is made, as the Department seems to believe, that federal rules of preemption can operate so as to require the granting of a variance. What is required is that once the Department decides to issue a variance, all provisions of the variance must comport with constitutional requirements.

***d. Relationship of the Port District to the Department***

The Department advances two final arguments in support of its position that the Port District and intervenors cannot succeed on the merits in this case. Both arguments rest on the Department's view of the Port District's relationship to the State of California and the obligations the Department perceives the Port District as having by virtue of that relationship.

**(1) *The "Control" Theory***

The first argument can be labelled as the "control" theory. It is the Department's contention that the Port District is a subordinate governmental entity which can be directed by its creator to exercise its proprietary powers to abate noise. This contention emanates from a footnote in *Air Transport Association* v. *Crotti,* 389 F.Supp. 58 (N.D.Cal.1975) (three-judge court), in which the court observed, "The Power of the State to generally regulate its political subordinates, including local airport authorities, is well established as a matter of law." 389 F.Supp. at 64 n.2.

[10] As a general proposition, the court agrees that the Port District cannot conduct its affairs in a manner contrary to state law or contrary to regulatory actions properly taken pursuant to state law. This proposition applies not just to the Port District, but to all citizens and entities in the state. What must be emphasized is that regulatory actions, to be valid and enforceable, must be constitutional. Actions taken pursuant to state law do not escape constitutional scrutiny simply because the state has regulatory or police power.

[11] The Port District stands before the court as a distinct governmental entity created by the state legislature. It was created in 1962 by the San Diego Unified Port District Act. (Cal.Harb. & Nav.Code, App. 1, § 1 *et seq.* (West 1978). The Port District was granted numerous powers and responsibilities under this legislation. Particularly significant to this case are a number of statutory provisions which established the authority of the Port District to own and operate Lindbergh Field. Section 14 of the Act required the City of San Diego to convey to the Port District all right, title, and interest in and to tidelands and submerged lands in San Diego Bay which were owned by the City. Cal.Harb. & Nav.Code, App. 1, § 14 (West 1978). The airport was located on such land; thus it was conveyed to the Port District. *See id.* §§ 68 & 70. Section 5 of the Act provides in pertinent part as follows:

> The jurisdiction of the district to exercise its powers shall extend only over the following areas:
>
> (a) The tidelands and submerged lands granted to the district pursuant to the provisions of this act.

> (b) Any airport or airports now or hereafter owned and operated by any of the above-named cities which establish the district, or San Diego County, and which are conveyed to the district by such city or cities or San Diego County.

*Id.* § 5. Other relevant powers granted to the Port District include the right to sue and be sued, the right to hold, enjoy, lease, and dispose of property, and the right to take all necessary action to exercise its powers. *Id.* §§ 23, 25, & 35.

There can be no doubt in light of this statutory scheme that the legislature intended the Port District to own, manage, and operate Lindbergh Field. There is no evidence that the legislature intended the Department or any other agency of state government to control the manner in which the Port District exercises its statutory powers. In fact, there is explicit statutory evidence to the contrary. In outlining the powers and duties of the Department, Public Utilities Code § 21632 provides as follows:

> The department may also acquire existing airports and air navigation facilities but it shall not acquire any airport or air navigation facility owned or controlled by a political subdivision of this or any other state without the consent of the political subdivision.

Since the legislature has carefully drafted a statutory scheme which confers on the Port District exclusive powers of ownership and control of Lindbergh Field, the Department cannot avoid application of the preemption doctrine by relying on the fact that the Port District is a political subdivision of the State. A non-

proprietor such as the Department should not be permitted to assume powers which are given solely to the Port District and thus avoid the rule of preemption announced in *Burbank*.

**(2) *The "Constructive Proprietor" Theory***

[12] The Department's second argument can be termed the "constructive proprietor" theory. In the Department's eyes, the airport is located on state tidelands which the Department contends the Port District holds in trust for the State. As a result, the Department believes it can exercise proprietary authority over airport operations.

This case does not present a situation where the State, through legislation, has attempted to become the owner and operator of Lindbergh Field. What the legislature has done is cast the Port District—not the Department—in the role of owner and operator. That the land on which Lindbergh Field is located may be State land, as the Department contends, cannot change the fact that the Port District is the only entity, under the Port District Act and Public Utilities Code, which has proprietary authority over the airport. The Port District's role as proprietor is reinforced by the Airport Operating Certificate issued in 1973 by FAA, which certifies "The San Diego Unified Port District . . . as owner and operator of San Diego International—Lindbergh Field." Consequently, the Department's suggestion that it can exercise proprietary authority over the airport cannot be accepted.

**3. *Conclusion***

For the foregoing reasons, the court believes the Port District and intervenors are likely to succeed on the merits in this case. Since the Port District and intervenors have demonstrated irreparable injury combined with probable success on the merits, they are entitled to a preliminary injunction under the first test in effect in this circuit.

**B. *Second Test***

[13] We now examine whether the Port District and intervenors are entitled to a preliminary injunction under the second test in effect in this circuit.

**1. *Serious Questions***

As indicated above, a non-proprietor of an airport is preempted by federal law from requiring a proprietor to adopt a curfew on aircraft landings and take-offs. On the basis of the factual record presently before the court, it appears that Condition 4 represents an attempt by the Department, a non-proprietor, to force the Port District to adopt an extended curfew at Lindbergh Field. Since the court believes Condition 4 is unconstitutional, this case does indeed raise very serious questions.

**2. *Balance of Hardships***

The court also believes the balance of hardships tips sharply in favor of the Port District and the intervenors. A longer curfew will disrupt or destroy the delicate balance which now exists between the concerns of the airport-area residents, the needs of the San Diego community as a whole, and the requirements of the airlines. A longer curfew will require readjustment of schedules by the airport and airlines, increased expendi-

tures by the airlines, cancellation of flights in and out of San Diego, and a resulting deterioration of airline service. These hardships loom particularly serious in light of the fact that Condition 4 probably will be declared unconstitutional by the court.

The Department, on the other hand, will suffer no appreciable hardship if a preliminary injunction issues. The only interest the Department can point to that would be at all harmed is its desire that the Port District comply with Condition 4 and adopt an extended curfew. This desire for compliance is relatively insubstantial when compared to the hardships an extended curfew will impose on the Port District and intervenors. Moreover, even though the Port District has not adopted an extended 11:00 p.m. to 7:00 a.m. curfew as required by Condition 4, a 12:00 midnight to 6:00 a.m. curfew, voluntarily adopted by the Port District, does remain in effect.

One final observation is pertinent to the question of relative hardships. In opposing the motion for a preliminary injunction, the Department has emphasized that enjoining Condition 4 will entail great social costs in the form of aircraft noise affecting airport-area residents. These residents are not parties to the litigation, however. The Department does not represent only those people who live in the vicinity of Lindbergh Field. It represents *all* residents of the state, including those who may prefer that Lindbergh Field have no curfew. While the court is sympathetic to the great annoyance visited upon airport-area residents by jet aircraft noise, it is not possible in this litigation for the court to pass judgment

on the noise problem at Lindbergh Field or the advantages and disadvantages of a curfew. The only issue in this case is the constitutionality of Condition 4, and the only parties before the court are the Port District, the airlines, and the Department.

**3. *Conclusion***

In sum, the Port District and intervenors have demonstrated that serious questions are raised and that the balance of hardships tips sharply in their favor. Thus, the Port District and intervenors have established their entitlement to a preliminary injunction under both tests applicable in the Ninth Circuit.

The court will issue a preliminary injunction enjoining the Department of Transportation, its officers, and employees from taking any action to terminate the noise variance on the ground that the Port District has not complied with Condition 4.

This opinion shall constitute the court's findings of fact and conclusions of law as required by Rule 52(a), Federal Rules of Civil Procedure.

***SUMMARY JUDGMENT***

The Department moves for summary judgment under Rule 56, Federal Rules of Civil Procedure. Rule 56(c) permits the entry of a summary judgment upon a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It appears from the substantial record of affidavits and exhibits before the court that there is no genuine issue as to any material fact. The Department's motion cannot be granted, however, be-

cause the Department is not entitled to judgment as a matter of law. As discussed in connection with the analysis of the motions for preliminary injunction, the Port District and intervenors have demonstrated probable success on the merits. Consequently, the Department's motion for summary judgment will be denied.

# APPENDIX D

## APPENDIX D

## UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO UNIFIED PORT DISTRICT,
*Plaintiff,*

and

AIR TRANSPORT ASSOCIATION OF AMERICA; AMERICAN AIRLINES, INC., a corporation; CONTINENTAL AIRLINES, INC., a corporation; DELTA AIRLINES, INC., a corporation; HUGHES AIR CORP., a corporation d/b/a AIR WEST; NATIONAL AIRLINES, INCORPORATED, a corporation; PACIFIC SOUTHWEST AIRLINES, a corporation; UNITED AIRLINES, INC., a corporation; and WESTERN AIRLINES, INC., a corporation,
*Plaintiffs-in-Intervention,*

vs.

ADRIANA GIANTURCO, Director of Transportation of the State of California; ELWIN J. McKENNEY, Chief of the Division of Aeronautics of the Department of Transportation of the State of California; and the DEPARTMENT OF TRANSPORTATION OF THE STATE OF CALIFORNIA,
*Defendants.*

CIVIL NO. 78-0097-S

ORDER:

(1) GRANTING MOTIONS BY PLAINTIFF AND PLAINTIFFS-IN-INTERVENTION FOR PRELIMINARY INJUNCTION; AND

(2) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The motions for preliminary injunction by the plaintiff, San Diego Unified Port District, and by the plaintiffs-in-intervention, the Air Transport Association of America, et al.; and the motion of the defendants,

Adriana Gianturco, Elwin J. McKenney and the California Department of Transportation, for summary judgment, came on regularly for hearing before this Court on August 21, 1978. The parties appeared through their respective attorneys of record, and the County of San Diego, previously permitted by the Court to appear as *amicus curiae*, appeared through its attorney, Cameron Reeves, Esq., Deputy County Counsel.

On August 30, 1978, this Court filed its opinion which, by its terms, contains the Court's findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a). In consideration of the reasons, findings of fact and conclusions of law stated in the opinion of the Court of August 30, 1978, IT IS HEREBY ORDERED THAT:

1. Although there are no disputed issues of fact between the Port District and the defendants, the defendants are not entitled to a summary judgment as a matter of law, and the defendants' motion for summary judgment is denied.

2. The motions of the plaintiff San Diego Unified Port District, and the plaintiffs-in-intervention, Air Transport Association of America, American Airlines, Inc., Continental Airlines, Inc., Delta Airlines, Inc., Hughes Air Corp., National Airlines Incorporated, Pacific Southwest Airlines, United Airlines, Inc., and Western Airlines, Inc. for a preliminary injunction are granted. Pending a final determination of this action, the defendants, and each of them, in their official and personal capacities, together with all officers, political subordinates, employees, attorneys, or agents of the defendants,

and those persons in active concert or participation with the defendants who receive actual notice of this order, by personal service or otherwise, are restrained from taking, attempting to take, or threatening to take any of the following actions:

(a) Termination, revocation, or further conditioning of the variance from the California Noise Standards regulations (21 Cal.Admin.Code §§ 5000 *et.seq.*) granted to plaintiff San Diego Unified Port District by the California Department of Transportation on January 17, 1978 ("Decision No. L-13612") for a failure of the San Diego Unified Port District to comply with Condition 4 of Decision No. L-13612);

(b) Any other enforcement or other punitive action against the plaintiff San Diego Unified Port District for its failure to adopt or enforce the curfew required by Condition 4 of Decision L-13612; and

(c) Hereafter utilizing or attempting to utilize the variance procedures or proceedings under the California Noise Standards, or enforcement provisions of the California State Aeronautics Act (California Public Utilities Code §§ 21001 *et.seq.*) to impose, or require the plaintiff San Diego Unified Port District to impose, a curfew on airport operations at San Diego International Airport—Lindbergh Field.

3. Plaintiff, San Diego Unified Port District, because it is a public entity, need post no security for costs as provided in Federal Rule of Civil Procedure 65(c); and plaintiffs-in-intervention need post no such security by reason of their substantially quasi-public character as licensed air transportation carriers.

4. This injunction shall be effective forthwith. This order may be served on defendants by service on their attorney of record, and service of copies of this order may hereafter be made on any agent, officer, political subordinate, employee, or attorney for the defendants, or any person acting in concert or participation with the defendants, by a United States Marshal or by any person who is a citizen of the United States, over the age of eighteen years, and not a party to this action.

ISSUED THIS 7TH DAY OF SEPTEMBER, 1978 AT 3:30 O'CLOCK P.M.

/s/ EDWARD J. SCHWARTZ
*United States District Judge*

# APPENDIX E

## APPENDIX E

## BEFORE THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF CALIFORNIA

In the Matter of the Statement of Issues Regarding the Application of:

PORT OF SAN DIEGO,

*Respondent,*

COUNTY OF SAN DIEGO, and CITY OF SAN DIEGO,

*Intervenors.*

NO. L-13612

### DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Department of Transportation as its decision in the above-entitled matter.

This Decision shall become effective immediately.

IT IS SO ORDERED this 17th day of January, 1978.

DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA

By /s/ E. J. McKenney
ELWIN J. McKENNEY
*Chief, Division of Aeronautics*

**BEFORE THE**
**DEPARTMENT OF TRANSPORTATION**
**OF THE STATE OF CALIFORNIA**

In the Matter of the Statement of
Issues Regarding the Application of:
PORT OF SAN DIEGO,
*Respondent,*
COUNTY OF SAN DIEGO, and
CITY OF SAN DIEGO,
*Intervenors.*

No. L-13612

## PROPOSED DECISION

This matter came on regularly for hearing before John A. Willd, Administrative Law Judge with the Office of Administrative Hearings, at San Diego, California, on June 20, 21, 22, 23, and 24, 1977. Edward J. Connor, Jr., Attorney for the Department of Transportation, represented the complainant. Respondent, Port of San Diego, was represented by Joseph D. Patello, Port Attorney. Intervenor, the County of San Diego, was represented by Cameron L. Reeves, Deputy County Counsel. Intervenor, City of San Diego, was represented by Curtis M. Fitzpatrick, Senior Chief Deputy City Attorney. Pacific Southwest Airlines was permitted to make a special appearance as an interested party to introduce evidence and submit written argument. PSA appeared through

Brownell Merrell, Jr., its attorney. All members of the public who indicated a wish to do so were afforded an opportunity to appear and to present evidence on their own behalf. Evidence both oral and documentary was received and all members of the public were permitted to submit any written comments or argument. The Brief of the San Diego Unified Port District was received on July 26, 1977. The Brief of the County of San Diego was received on August 15, 1977. The Brief of the City of San Diego was received on August 9, 1977. The Brief of Pacific Southwest Airlines was received on August 9, 1977. The Brief of the Department of Transportation was received on September 6, 1977. The Reply Brief of the San Diego Unified Port District was received on September 21, 1977 and a response to that Brief from the Department of Transportation was received on September 26, 1977. On October 14, 1975 the matter was submitted. After due consideration of all the evidence presented and after reviewing all of the written argument and written statements, the Administrative Law Judge makes the following findings of facts:

I

On or about January 13, 1977 respondent Port of San Diego filed with the Department of Transportation its application requesting variance from the Department's regulation establishing Noise Standards for California Airports as contained in Chapter 9, Subchapter 6 of Title 4 of the California Administrative Code, hereafter referred to as "Noise Standards". Respondent's application pertains to the San Diego International Airport more

commonly referred as Lindbergh Field and that application is now pending before the Department of Transportation.

II

Respondent's application requests a variance from Section 5062 of the Noise Standards which section reads as follows:

> "5062. *Noise Impact Area Violations*
> No airport proprietor shall operate his airport with a noise impact area of other than zero unless said operator has a variance as prescribed in Article 13 of this subchapter of these regulations."

III

In part respondent's application for variance reads as follows:

> "(5062. Noise Impact Area Violations)
> Approach zones to runways 9 and 27 within the 75 dB Noise Impact Boundary contain single-family dwelling units as incompatible uses. Request one year variance to continue operations."

The application describes the size of the impact area to be 0.55 square miles. The application also indicates that the approximate number of homes within the 70 CNEL contour line is not known, but this number is greater than 1000 based upon monitoring information.

IV

By stipulation filed with the Department of Transportation on May 24, 1977 and signed by representatives on behalf of the Department of Transportation, the Port of San Diego, the County of San Diego and the City of San

Diego. It was agreed pursuant to Government Code Section 11500(b) that the County of San Diego and the City of San Diego each may intervene as a party to this proceeding.

V

On June 6, 1977 notice of public hearing concerning Lindbergh Field was published in the San Diego Union, a newspaper of general circulation published and printed daily in the City of San Diego, County of San Diego. Said notice did set forth the time and place of hearing, it described the variance requested, the issue to be considered and the notice also did advise that affected or interested persons will be afforded the opportunity of making verbal or written statement whether in favor or opposition of the proposed variance. The hearing was duly commenced at the time and place set forth in the notice and oral presentations were received from all members of the public who indicated their desire to appear. Written material was received by members of the public and such material has been made part of this record.

VI

This is the second request for variance filed by the Port of San Diego with the Department of Transportation of the State of California. The first request resulted in the granting of a variance on January 16, 1976 and which variance was subject to certain conditions. Considerable background information concerning Lindbergh Field was set forth in the decision which granted

the first variance and it is not intended to again set forth all of this background information. Nonetheless it is of value to briefly describe certain information.

VII

The San Diego Unified Port District is composed of five member cities which include San Diego, National City, Chula Vista, Imperial Beach and Coronado. The district has been organized under State law. Lindbergh Field holds the status of an International Airport which permits the arrival of civil aircraft from origins outside the United States.

VIII

San Diego is the second largest city in the State of California and ranks ninth in the United States. The County of San Diego has a population of approximately 1,600,000. Lindbergh Field is the only major airport serving the San Diego community. The certified air carriers having regular schedules to Lindbergh Field include American Airlines, United Air Lines, National Airlines, Delta Air Lines, Western Air Lines, Hughes Air West, Continental Airlines, Pacific Southwest Airlines and Air California. There are other certificated air carriers who use Lindbergh Field on a charter basis. During the past year approximately 4.9 million passengers have arrived or departed Lindbergh Field. There are approximately 200 carrier operations daily at the facility as well as numerous operations by private air craft and the tower is maintained twenty-four hours a day by persons under the jurisdiction of the FAA.

IX

Since the first hearing in September 1975, there have [been] at least three significant developments (1) the Port of San Diego has adopted a curfew which prohibits landings and take-offs by commercial air carriers during the hours from 12 midnight until 6:00 a.m. (2) The FAA has adopted regulations which will require the retrofit or replacement of aircraft according to a schedule which is to be completed by January 1, 1985. (3) A Federal Aviation Noise Abatement Policy has been adopted which policy suggests that the FAA might offer more cooperation and support to airport proprietors seeking to reduce the size of a noise impact area.

X

Tourism remains as the third largest industry in San Diego. This community continues to attract statewide, national and international conventions. In addition, tourists in ever increasing numbers have been attracted to the San Diego area because of the multitude of factors which include favorable climate, tourist attractions and the proximity to Mexico. Actually, the economic importance of the airport is so great to the San Diego community that the intervenors do not suggest that a variance not be granted nor do the intervenors suggest any substantial reduction in air services. Likewise the private citizens who did appear rarely suggested any appreciable reduction in passenger service.

XI

The intervenors expressed considerable disappoint-

ment concerning the good faith efforts of the respondent to achieve any noise reduction and to comply with those conditions imposed as a result of the prior application. With respect to condition (2) the intervenors contend that respondent did not exercise diligence and did not pursue every avenue to implement an 11:00 p.m. to 7:00 a.m. nighttime restriction on landings and takeoffs. Protestants suggest that the existing midnight to 6:00 a.m. restriction was essentially adopted prior to the issuance of the first variance and there was no subsequent effort to extend the nighttime restriction. The protestants urge that respondent has probably increased the impact area because one new commercial airline (Continental) has been added. The midnight to 6:00 a.m. nighttime restriction is actually a lesser rstriction than was previously imposed and finally that there are now more flights because of increased charter aircraft usage. Concerning condition (3) a microwave two segment approach, respondent indicated that an FAA official advised respondent that such a system is not presently available and evidently would not be available for some period of time. The intervenors suggest that respondent's efforts as to condition (3) were minimal. Condition (4) related to power cutback procedure and requested studies and implementation of such procedure. The evidence indicates that the airlines are using a power cut-back procedure. However, no studies were presented on this topic. Condition (5) provided that the respondent was to request the FAA to issue a visual approach path for runway 27. Evidently the condition

was not clear, in that officials of respondent did not consider a visual approach path to be a noise abatement procedure. Actually, it was intended that a visual approach be related to the two segment approach whereby the early approach is at a somewhat steeper angle in order to keep the aircraft at a higher altitude for as long as is reasonably consistent with safety. Condition (6) requested respondent to present recommendations regarding zoning to the Comprehensive Planning Organization. In this area respondent did not develop any of its recommendations and it regrettably appears that there is little communication between the Comprehensive Planning Organization and respondent. Condition (7) related to cooperation with LAX in that airport's program to require compliance with FAR 36 over a period of years. There is no showing that respondent acted on this recommendation but in any event as a result of the FAA action the question has become mute. Condition (8) directed respondent to monitor and record a noise information related to CNEL contours and SENEL information. This information was to be available to the Department of Transportation. There is no real showing as to whether or not this condition was complied with. Respondent does urge that single event information should not be maintained under the Crotti Decision. It also appears that the Department of Transportation did not request this information. Condition (9) required respondent to seek position papers from each of the air carriers with respect to certain noise reducing efforts. This condition has been complied with. The final condi-

tion required the District to make reports to the Department of Transportation and to the County of San Diego. Reports were made but it is the County's position that specific documentation was inadequate.

XII

The results achieved under the first variance have been disappointing to the City and County of San Diego. Residents who have been subjected to noise from aircraft have likewise been disappointed and there is some feeling that respondent is capable of more in the way of noise reduction than has thus far been demonstrated. Actually, Lindberg Field will continue to have an extremely serious noise problem for a long period of time. There are no realistic solutions presently available to bring Lindbergh Field into compliance with the State Noise Standards. Operational techniques have and will produce only minimal noise reduction. A program of massive land acquisition is not contemplated at the present time and in any event such a program would be extremely expensive. Even if all commercial aircraft were in compliance with the FAR 36 requirements Lindbergh Field would yet be far short of the State noise objectives. It is hoped that future aircraft will be less noisy but no one can now predict the degree of success in this area. There are currently efforts to relocate the San Diego Airport to an area where few would be disturbed, and of course, the San Diego community may decide to take that action. Such a result, however, is quite doubtful at the present time. Officials of the Port Authority are understandably rather defensive. There

are lawsuits currently pending which could be extremely costly to the Port Authority. The airport is generally blamed for all of the noise produced and yet the airport has no authority concerning the construction or flight of the aircraft. It is quite obvious that the noise problem is not subject to any instant solution. It is critically important therefore that all of the segments involved in the airport operation cooperate to the fullest extent so that the maximum noise benefits might be achieved. The Accusations and counter-charges have been devisive. Public confidence in the airport and in a noise program will only be established when it can be demonstrated that every possibility to reduce noise is being tested and then positive programs implemented. Technical limitations have not been the only frustration regarding noise. Effective control has been dissipated through many layers of local, state and federal government. The federal government, of course, possesses a great deal of authority and in the past it has apparently been more concerned with providing an efficient and safe national transportation network. Federal cooperation in the area of noise control, however, now looks more promising than ever before. The variance then must be directed toward sincere cooperation and flexibility. A framework must be established to bring the many interests together and to direct their efforts towards noise reduction.

XIII

The County of San Diego and the City of San Diego each recommended several conditions. The County's conditions include a recommendation of the County De-

partment of Transportation calling for the Port District to develop and implement a comprehensive noise control plan for Lindbergh Field in accordance with the provisions of the Federal Aviation Noise Abatement Policy. Such a condition appears reasonable and could be a promising starting point for a long term program. The remaining thirteen county recommendations were formulated by the County Noise Control Hearing Board which recommendations include: 1 That a noise plan be prepared; that it include certain recommendations; that it be adopted by a date certain and that a Citizen's Advisory Board participate in the formulating, review and approval of such plan. The Port Authority strenuously objects to this condition and the Authority granted the Citizen's Advisory Board would very likely amount to an unlawful delegation of governmental authority granted to the Port District. In any event, a lawsuit would be virtually inevitable.

Recommendations 2 and 3 call for a noise budget and noise charges. Basically, each airline would be granted a noise budget and charges would be imposed for noise in excess of this budget. It is possible that a plan of this sort may ultimately be applied on a nationwide basis. To impose such a plan at Lindbergh Field, however, could possibly be disastrous. PSA states flatly that they would move their headquarters to San Francisco and many jobs would be lost in the San Diego area. San Diego air service would be reduced and such a condition would probably be challenged in the courts.

Recommendation 4 calls for an accelerated schedule

of FAR Part 36 Aircraft. In view of the fact that the FAA has now adopted a schedule for FAR Part 36 compliance, the state should support that program and not challenge the FAA by imposing a different schedule, particularly at a single airport.

Recommendation 5 calls for a curfew from the hours of 11:00 p.m. to 7:00 a.m. The evidence presented demonstrates that such a curfew would have but a minimal and incidental effect upon interstate commerce, and such effect would not be excessive when compared with the goals of reducing and controlling the noise levels in residential areas surrounding Lindbergh Field.

The 6th recommendation would prohibit any new airline from using equipment which did not comply with FAR Part 36 requirements. The requirement would also apply to additional flights and flights which would be changed in certain respects. General aviation might also be prohibited under this condition. This condition is frankly subject to serious challenge. The airlines and general aviation users would certainly urge that such a condition amounts to unfair discrimination.

Recommendations 7, 8, and 9 would require the district to request the FAA to (1) Prepare a local flow traffic management plan; (2) To develop and implement a single departure heading from runway two seven and (3) to publish an experimental profile descent procedure for Lindbergh Field. It is the position of the airport that these requirements would not reduce noise. While these recommendations may be of some benefit, it might be appropriate at this time to avoid conditions

of such a specific nature. Actually, the respondent should work with the FAA in the development of a suitable program and explore numerous avenues.

Recommendation 10 calls for the installation of three additional noise monitoring stations. It is suggested that the County could then make a better evaluation of flight track scatter. It could determine the validity of noise complaints and identify the 65 CNEL contour. This information might, of course, be helpful to the County. However, the existing system does meet state standards and that is all the state is justified in requiring. Additional stations are expensive to install and to maintain. The information desired is essentially available at the present time and airport officials are frankly suspicious that the information of this sort is desired most by those who are suing the airport. It is understandable that the airport is somewhat unwilling to pay for and prepare the very evidence which its opponents wish to present in future litigation.

Recommendation 11 would require the Port Authority to provide the County with considerable information concerning aircraft activity, population and property valuations; but much of this requested information could more easily be obtained by the County itself. The County is entitled to certain information pursuant to Section 5050(e); the state should not insist that the respondent go beyond this requirement.

The 12th recommendation would require the District to cooperate with the City and County in establishing a Citizen's Noise Abatement Review Board and to pro-

vide the financial backing and the staff necessary for the Board's operation. If such a Board were to have any regulatory authority, a serious question of unlawful delegation of power could arise. Actually, a citizen's advisory group of some sort might be put to very good use and the results might be very beneficial. The Port Authority, of course, is quite concerned that individuals most interested in Board membership would be quite hostile to the airport and the Board might then become a forum used to attack the airport itself. Conceding that their might be benefits from such a board, the requested condition at this time appears premature.

The final condition would require that the District cooperate with the County in efforts to obtain financial grants from the federal government and other agencies to research the health effects of aircraft noise and to plan methods to resolve such problems. No one can quarrel with research and federal grants have a certain attraction, but this does not appear to be an appropriate condition to the variance. The County and the City are certainly capable of requesting federal grants. The airport should be permitted to support those efforts or not as it chooses.

XIV

The City of San Diego submitted the following recommended conditions:

The first recommendation would require the Port Authority to prepare a program which would reduce the noise impact of the airport to an acceptable degree in an orderly manner with the object of achieving a noise

impact area of zero by 1980 based upon a 65 CNEL criterion. It is true that a noise abatement plan is quite desirable, but unfortunately a zero impact area by 1980 is not presently possible with existing technology and assuming comparable air service. Any such program would be a fiction and would raise false hopes in those who are currently effected by airport noise.

The City's second recommendation calls for the installation of additional noise monitors. The City urges that these monitors are needed so that the City may properly set standards for housing insulation. As mentioned previously, the existing monitoring system does meet the standards required by the state. The available information is sufficient to permit the City to establish the contours which they desire with reasonable accuracy.

The third recommendtion of the City would require that respondent collect and submit certain information to the City of San Diego. It would include locating noise contours, information regarding the number and type of aircraft arriving and departing, hourly sound levels and certain single event noise information. Again much of this information is presently available to the City. Some of the information, however, might be rather costly to obtain. The Port Authority is naturally reluctant to gather information which would ultimately be used in lawsuits against the airport and it must be conceded that conditions of this sort do not achieve any noise reduction.

The final recommendation of the City calls for the respondent to make available all relevant data concern-

ing airport noise problems. It is beyond question that one of the desired objectives is the free and open exchange of information as well as the good faith cooperative effort to resolve the problem. This respondent has been reluctant in the past to make noise information available. The City obviously has a keen interest regarding the actions taken by airport management regarding noise problems. The imposition of a condition of this sort unfortunately might result in a continuing argument as to just what was made available and just what must be made available.

XV

There were fewer citizens who appeared and testified in this hearing when compared to the first variance hearing. This does not suggest, however, that the citizens are now satisfied with the airport noise problem. Many have frankly become discouraged and have accepted the view that nothing can or will be accomplished. Certainly, the noise problem is serious and solutions are difficult to find. It is therefore even more critical that accusations and charges be avoided and a cooperative effort be undertaken so that the maximum gains may be achieved. Government at all levels should deal most candidly with the public in order to replace suspicion with confidence.

* * * * *

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

I

It has been established that the public interest does require the grant of the variance from Title 4, Chapter 9, Subchapter 6, Article X, Section 5062 of the California Administrative Code, pursuant to Section 5075 of said Chapter in that:

The grant of the applied-for variance is consistent with the underlying intent of the noise standards for California airports.

II

In weighing the public interest, consideration has been given to the economic and technological feasibility of immediate compliance; the value to the public of the continued operation of the airport and the effect upon the public and the local economy of a denial of the variance. Consideration has also been given to the noise impact resulting from the grant and the detriment that will be caused thereby. Consideration has also been given to the efforts which have been made by the Port Authority to minimize present noise problems and its efforts to achieve required state standards. Consideration has been given to the ability of respondent to carry out proposed noise program and to achieve the objectives of such program at the earliest possible date with the least amount of land use conversion.

III

It is in the public interest that certain desirable conditions be imposed upon the grant of the requested vari-

ance. In imposing conditions primary consideration has been given to those conditions which hopefully will promote a true cooperate spirit between the respondent, various governmental entities, the airline operators and citizens who reside in the vicinity of the airport.

* * * * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The application of the San Diego Unified Port District for a variance from those requirements of Section 5062, Chapter 9, Subchapter 6, Title 4, of the California Administrative Code is hereby granted subject to the following terms and conditions.

1. The variance granted herein shall be limited to a period of one year from the effective date of this order.

2. Respondent San Diego Unified Port District shall appoint a qualified individual who shall have the authority to speak on the airport's position regarding operational techniques. The individual selected shall be made available to attend any meetings scheduled under the auspices of the Department of Transportation and it is to be anticipated that such meetings may be attended by representatives of the FAA, the County of San Diego, the City of San Diego and airline operators. The Department of Transportation will provide respondent with reasonable notice of the time and location of such meetings and will also indicate what agencies or individuals have been invited to attend. The individ-

ual selected by respondent as its representative at such conferences may be accompanied by additional individuals who may have particular expertise in areas to be discussed. It is anticipated that the respondent's representative will be able to discuss any progress, modifications or proposals regarding respondent's noise abatement plan.

3. Respondent San Diego Unified Port District shall promptly develop an implement to the extent possible. A comprehensive noise control plan for Lindbergh Field in accordance with the provisions of the Federal Aviation Noise Abatement Policy. Said plan shall be prepared within six months from the effective date of this decision; provided, however, that upon good cause shown therefor the Department of Transportation may extend this time period for an additional six months. The comprehensive noise control plan shall set forth and discuss the various noise reduction programs that respondent has already established, those plans which it intends to establish or hopes to establish in the future and respondent shall further describe and discuss those noise abatement plans or programs which respondent has considered but rejected for any reason. The respondent's comprehensive noise control plan shall include but is not limited to the following items:

(1) Curfew
(2) Restrictions to types of aircraft
(3) Runway preferential use
(4) Flight paths or tracks
(5) Operational techniques
(6) Land acquisition
(7) Land use compatibility
(8) Airport design
(9) Aircraft scheduling

(10) Location and time for engine run-up.

The comprehensive noise control plan shall be prepared after allowing for consultation with FAA and the final plan is to be submitted to the FAA for its review and comment allowing appropriate time for FAA action prior to the due date for adoption.

4. Respondent San Diego Unified Port District is to retain the existing curfew which currently prohibits takeoffs and landings by commercial air carriers between the hours of 12 midnight and 6:00 a.m. Respondent is to extend this existing curfew to the extent that commercial air carriers will not be permitted to take off between the hours of 11:00 p.m. and 7:00 a.m. and commercial air carriers will not be permitted to land between the hours of 11:00 p.m. and 7:00 a.m. unless such aircraft meet FAR Part 36 requirements. The curfew shall be extended as described within 120 days of the effective date of this order unless respondent secures from the Federal Aviation Administration a written determination with supporting factual findings that the Federal Aviation Administration has determined the proposed curfew extension to be unjustly discriminatory or detrimental to the National Air Transportation System. Respondent shall submit its request to the Federal Aviation Administration for review within sixty days of the effective date of this order and such request shall contain all of the information required by the Aviation Noise Abatement Policy of November 18, 1976. The Department of Transportation for good cause shown may grant an extension of the above time periods. Said extension, however, shall not exceed sixty days and in order to obtain an

extension respondent shall show one or more of the following:

a. That the Federal Aviation Administration has requested and justified an extension of time in which to secure more information or in which to complete its review and provide a determination. The additional time is required to permit the adjustment of airline schedules, or for such other reasons, as in the discretion of the Department, constitute justification for extending the time period.

5. Respondent San Diego Unified Port District shall continue to monitor and record noise information as is required to establish the various CNEL contours and respondent shall also monitor and record SENEL information which shall be supplied to the Department of Transportation upon its request.

6. Respondent San Diego Unified Port District shall prepare written reports regarding noise conditions at the airport as well as the efforts and achievements of respondent in correcting these conditions as may be required from time to time by the Department of Transportation. Respondent shall also submit to the County of San Diego at the end of each calendar quarter year written documentation outlining the specific actions taken by respondent to implement the various conditions imposed herein. Such documentation shall be provided at a date to be specified by the County of San Diego so that the County of San Diego can include the information in its quarterly report to the Department of Transportation as required by Section 5050(e) of the Department's Noise Regulations.

The variance granted herein shall excuse respondent from full compliance from only those conditions specifically mentioned herein, and in the event respondent violates any of the terms and conditions or requirements of this order; or should respondent violate any other laws or regulations of the State of California pertaining to airport noise, such conduct shall constitute cause for termination or further conditioning of the variance granted herein.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as a result of the hearing had before me on the above-dates at San Diego, California and recommend its adoption as the decision of the Department of Transportation.

DATED: Dec. 9, 1977

/s/ John A. Willd
JOHN A. WILLD
*Administrative Law Judge*
*Office of Administrative Hearings*

*JAW:mh*

# APPENDIX F

## APPENDIX F

*Portions of the California State Aeronautics Act taken from the California Public Utilities Code.*

21669. The department shall adopt noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit issued by the department to an extent not prohibited by federal law. The standards shall be based upon the level of noise acceptable to a reasonable person residing in the vicinity of the airport.

21669.1. [Now repealed as purpose fulfilled.] There is hereby established an advisory committee to assist the department in the adoption of noise standards. The committee shall be composed of seven members appointed by the Governor as follows:

(a) Two members, one of whom shall be representative of homeowners concerned with aircraft noise.

(b) One member each from the Department of Public Health, the League of California Cities, the County Supervisors Association, the Department of Education, and the Air Transport Association.

The existence of the committee shall terminate on January 1, 1971.

21669.2. In its deliberations, the department and the advisory committee shall be governed by the following guidelines:

(a) Statewide uniformity in standards of acceptable airport noise need not be required, and the maximum amount of local control and enforcement shall be permitted.

(b) Due consideration shall be given to the economic and technological feasibility of complying with the standards promulgated by the department.

21669.3. [As originally enacted.] The department shall submit a comprehensive report of the noise regulations adopted pursuant to Sections 21669, 21669.1 and 21669.2 to the Legislature on or prior to April 1, 1970, and the regulations shall go into effect on January 1, 1971 in the absence of legislative action adopting different standards.

21669.3. [As amended, Cal. Stats. 1971, ch. 1734.] (a) The department shall submit a comprehensive report of the noise regulations adopted pursuant to Sections 21669, 21669.1 and 21669.2 to the Legislature on or prior to December 31, 1970, and the regulations shall go into effect on December 1, 1972, except as provided in subdivisions (b), (c), and (d).

(b) Any regulations designed to establish a noise monitoring program at an airport shall go into effect on the effective date of the amendments to this section enacted at the 1971 Regular Session of the Legislature. Any regulations applicable to airports entering service after November 30, 1971, shall go into effect on that date.

(c) Every county board of supervisors shall, as of the effective date of the amendments to this section enacted at the 1971 Regular Session of the Legislature, designate airports within their respective counties having a noise problem for purposes of this subdivision. Each airport so designated shall, on or before December 1, 1971, have a noise monitoring system meeting the requirements of the department's noise regulations in operation. The department may grant an extension of time for compliance with this subdivision where an airport operator shows to the satisfaction of the department that noise monitoring equipment is not available. This subdivision shall be effective only until December 1, 1972,

and after that date shall have no force or effect.

(d) At every airport in operation on the effective date of the amendments to this section enacted at the 1971 Regular Session of the Legislature which has a volume of passenger traffic exceeding one million persons arriving and departing per year, and which is determined under subdivision (c) to have a noise problem, there shall not be any increase in the noise level beyond that which existed at such airport at the date of the determination. In the event any action taken under any noise regulation of the department, or in the event the implementation of any technological improvements, succeeds in lowering the level of noise at the airport, such reduced level of noise shall constitute the permissible limits of noise. This subdivision and the noise limits specified in this subdivision, to the extent permissible under federal law, shall be effective only until December 1, 1972, and after that date shall have no force or effect.

21669.3. [As currently amended.] Any regulations designed to establish a noise monitoring program at an airport entering service after November 30, 1971, shall go into effect on the date the airport enters service.

21669.4. (a) The violation of the noise standards by any aircraft shall be deemed a misdemeanor and the operator thereof shall be punished by a fine of one thousand dollars ($1,000) for each infraction.

(b) It shall be the function of the county wherein an airport is situated to enforce the noise regulations established by the department. To this end, the operator of an airport shall furnish to the enforcement authority designated by the county the information required by the department's regulations to permit the efficient enforcement thereof. The operator of

each airport shall reimburse the county for its costs of implementing the airport noise regulations contained in Article 8 (commencing with Section 5050) of subchapter 6 of Title 4 of the California Administrative Code, which shall, for purposes of subdivision (c), credit the operator for any amounts received from penalties assessed for violations at such airport. Upon request of the operator, the department shall review and shall determine the reasonableness of such costs, and such costs may be considered in fixing any airport user fees.

(c) Penalties assessed for the violation of the noise regulations shall be used first to reimburse the General Fund for the amount of any money appropriated to carry out the purposes for which the noise regulations are established, and second be used in the enforcement of the noise regulations at participating airports.

21669.6. Hearings under this article required by the provisions of Sections 21665, 21666, 21668, 21668.2, and 21669, or regulations adopted pursuant to such provisions, shall be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

*California Statutes 1969, chapter 1585. [Uncodified urgency provision.]*

Sec. 7. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

Noise from airport operations is a serious environmental pollutant and is a burden borne by many throughout California.

School districts are finding that aircraft noise increases the cost of education in the vicinity of airports. In the Los Angeles area, approximately 40 schools are subjected to aircraft noise. One elementary school was closed in Los Angeles because of aircraft noise, and the Los Angeles Board of Education estimates that it would cost $3.5 million to soundproof seven of the schools presently subjected to aircraft noise.

The physical and emotional well-being of residents adjacent to airports are endangered because of constant exposure to aircraft noise. Aircraft noise prohibits the full enjoyment of their homes and at time reduces the value of property to a homeowner.

For these reasons, it is necessary that this act take immediate effect so that the Department of Aeronautics may establish the aircraft noise regulations required by this legislation.

# APPENDIX G

# APPENDIX G
# TITLE 21, CALIFORNIA ADMINISTRATIVE CODE, CHAPTER 2.5

## SUBCHAPTER 6. NOISE STANDARDS

### Article 1. General

**5000. Preamble.**

The following rules and regulations are promulgated in accordance with Article 3, Chapter 4, Part 1, Division 9, Public Utilities Code (Regulation of Airports) to provide noise standards governing the operation of aircraft and aircraft engines for all airports operating under a valid permit issued by the department. These standards are based upon two separate legal grounds: (1) the power of airport proprietors to impose noise ceilings and other limitations on the use of the airport, and (2) the power of the state to act to an extent not prohibited by federal law. The regulations are designed to cause the airport proprietor, aircraft operator, local governments, pilots, and the department to work cooperatively to diminish noise. The regulations accomplish these ends by controlling and reducing the noise in communities in the vicinity of airports.

NOTE: Authority cited: Section 21669, Public Utilities Code. Reference: Sections 21669–21669.4, Public Utilities Code.

**5001. Liberal Construction.**

This subchapter shall be liberally construed and applied to promote its underlying purposes which are to protect the public from noise and to resolve incompatibilities between airports and their surrounding neighbors.

**5002. Constitutionality.**

If any provision of this subchapter or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

**5003. Provisions Not Exclusive.**

The provisions of this subchapter are not exclusive, and the remedies provided for in this subchapter shall be in addition to any other remedies provided for in any other law or available under common law. It is not the intent of these regulations to preempt the field of aircraft noise limitation in the state. The noise limits specified herein are not intended to prevent any local government to the extent not prohibited by federal law or any airport proprietor from setting more stringent standards.

**5004. Applicability.**

These regulations establish a mandatory procedure which is applicable to and at all existing and future potential airports in California which are required to operate under a valid permit issued by the department. These regulations are applicable (to the degree not prohibited by federal law) to all operations of aircraft and aircraft engines which produce noise. Only those airports which shall have been determined to have a noise problem (in accordance with Section 5050) will be required to perform noise monitoring.

The regulations established by this subchapter are not intended to set noise levels applicable in litigation arising out of claims for damages occasioned by noise. Noth-

ing herein contained in these regulations shall be construed to prescribe a duty of care in favor of, or to create any evidentiary presumption for use by, any person or entity other than the State of California, the counties and airport proprietors in the enforcement of these regulations.

**5005. Findings.**

Citizens residing in the vicinity of airports are exposed to the noise of aircraft operations. There have been numerous instances wherein individual citizens or organized citizen groups have complained about airport noise to various authorities. The severity of these complaints has ranged from a few telephone calls to organized legal action. Many of these cases have been studied by acoustics research workers under sponsorship of governmental and private organizations. These studies have generally shown that the severity of the complaint is principally associated with a combination of the following factors:

(a) Magnitude and duration of the noise from aircraft operations;

(b) Number of aircraft operations; and

(c) Time of occurrence during the day (daytime, evening or night).

There are many reasons given by residents for their complaints; however, those most often cited are interference with speech communication, TV, and sleep. A number of studies have been made related to speech interference and hearing damage, and some studies have been made related to sleep disturbance and other

physiological effects. These studies provide substantial evidence for the relationship between noise level and its interference with speech communication and its effect relative to hearing loss. Significantly less information is available from the results of sleep and physiological studies.

In order to provide a systematic method for evaluating and eventually reducing noise incompatibilities in the vicinity of airports, it is necessary to quantify the noise problem. For this purpose, these regulations establish a procedure for defining a noise impact area surrounding an individual airport. The criteria and noise levels utilized to define the boundaries of the noise impact area have been based on existing evidence from studies of community noise reaction, noise interference with speech and sleep, and noise induced hearing loss.

One of the fundamental philosophies underlying the procedures in these regulations is that any noise quantity specified by these regulations be measurable by relatively simple means. Therefore, these regulations utilize as their basic measure the A-weighted noise level, which is the most commonly accepted simple measure. To insure consistency between criteria and measurement, the units for the criteria are also based on the A-weighted sound level rather than one of the several more complex perceived noise levels.

The level of noise acceptable to a reasonable person residing in the vicinity of an airport is established as a community noise equivalent level (CNEL) value of 65 dB for purposes of these regulations. This criterion level

has been chosen for reasonable persons residing in urban residential areas where houses are of typical California construction and may have windows partially open. It has been selected with reference to speech, sleep and community reaction.

It is recognized that there is a considerable individual variability in the reaction to noise. Further, there are several factors which undoubtedly influence this variability and which are not thoroughly understood. Therefore, this criterion level does not have a degree of precision which is often associated with engineering criteria for a physical phenomenon (e.g., the strength of a bridge, building, et cetera). For this reason, the state will review the criterion periodically, taking into account any new information which may become available.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment of subsection (c) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5006. Definitions.**

(a) Sound Pressure Level (SPL): The sound pressure level, in decibels (dB), of a sound is 20 times the logarithm to the base of 10 of the ratio of the pressure of this sound to the reference pressure. For the purpose of these regulations, the reference pressure shall be 20 micronewtons/square meter ($2 \times 10^{-4}$ microbar).

(b) Noise Level (NL): Noise level, in decibels, is an A-weighted sound pressure level as measured using the slow dynamic characteristic for sound level meters specified in ASA S1.4—1961, American Standard Specifi-

cation for General Purpose Sound Level Meters, or latest revision thereof. The A-weighting characteristic modifies the frequency response of the measuring instrument to account approximately for the frequency characteristics of the human ear. The reference pressure is 20 micronewtons/square meter ($2 \times 10^{-4}$ microbar).

(c) Noise Exposure Level (NEL): The noise exposure level is the level of noise accumulated during a given event, with reference to a duration of one second. More specifically, noise exposure level, in decibels, is the level of the time-integrated A-weighted squared sound pressure for a stated time interval or event, based on the reference pressure of 20 micronewtons per square meter and reference duration of one second.

(d) Single Event Noise Exposure Level (SENEL): The single event noise exposure level, in decibels, is the noise exposure level of a single event, such as an aircraft flyby, measured over the time interval between the initial and final times for which the noise level of a single event exceeds the threshold noise level.

(e) Hourly Noise Level (HNL): The hourly noise level, in decibels, is the average (on an energy basis) noise level during a particular hour. Hourly noise level is determined by subtracting 35.6 decibels (equal to 10 $\log_{10} 3600$) from the noise exposure level measured during the particular hour, integrating for those periods during which the noise level exceeds a threshold noise level.

For implementation in this subchapter of these regu-

lations, the threshold noise level shall be a noise level which is 10 decibels below the numerical value of the appropriate criterion CNEL which is specified in Section 5012. At some microphone locations, sources of noise other than aircraft may contribute to the CNEL. Where the airport proprietor can demonstrate that the accuracy of the CNEL measurement will remain within the required tolerance in Section 5045, the department may grant a waiver to increase the threshold noise level.

(f) Daily Community Noise Equivalent Level (CNEL): Community noise equivalent level, in decibels, represents the average daytime noise level during a 24-hour day, adjusted to an equivalent level to account for the lower tolerance of people to noise during evening and night time periods relative to the daytime period. Community noise equivalent level is calculated from the hourly noise levels by the following:

$$CNEL = 10 \log (1/24) [\Sigma \text{ antilog } (HNLD/10) + 3 \Sigma \text{ antilog } (HNLE/10) + 10 \Sigma \text{ antilog } (HNLN/10)]$$

Where

HNLD are the hourly noise levels for the period 0700–1900 hours;

HNLE are the hourly noise levels for the period 1900–2200 hours;

HNLN are the hourly noise levels for the period 2200–0700 hours; and $\Sigma$ means summation.

(g) Annual CNEL: The annual CNEL, in decibels, is the average (on an energy basis) of the daily CNEL over

a 12-month period. The annual CNEL is calculated in accordance with the following:

Annual CNEL = 10 $\log_{10}$ [(1/365) Σ Antilog (CNEL(i)/10]

Where

CNEL(i) = the daily CNEL for each day in a continuous 12-month period, and Σ means summation.

When the annual CNEL is approximated by measurements on a statistical basis, as specified in Section 5022, the number 365 is replaced by the number of days for which measurements are obtained.

(h) Noise Impact Boundary: Noise impact boundary around an airport consists of the locus of points for which the annual CNEL is equal to the criterion value.

(i) Noise Impact Area: Noise impact area, in square statute miles, is the total land area within the noise impact boundary less that area deemed to have a compatible land use in accordance with Section 5014.

(j) Airport Proprietor: Airport proprietor means the holder of an airport permit issued by the department pursuant to Article 3, Chapter 4, Part 1, Division 9, Public Utilities Code.

(k) Aircraft Operator: Aircraft operator means the legal or beneficial owner of the aircraft with authority to control the aircraft utilization; except where the aircraft is leased, the lessee is the operator.

(*l*) Air Carrier: Air carrier is any aircraft operating pursuant to either a federal or a state certificate of public convenience and necessity, including any certificate issued pursuant to 49 U.S.C. Section 1371 and any permit issued pursuant to 49 U.S.C. Section 1372.

(m) General Aviation: General aviation aircraft are all aircraft other than air carrier aircraft and military aircraft.

(n) Department: Department means the Department of Aeronautics of the State of California.

(o) County: County, as used herein, shall mean the county board of supervisors or its designee authorized to exercise the powers and duties herein specified.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment of subsection (d) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

## Article 2. Airport Noise Limits

**5010. Purpose.**

The purpose of these regulations is to provide a positive basis to accomplish resolution of existing noise problems in communities surrounding airports and to prevent the development of new noise problems. To accomplish this purpose, these regulations establish a quantitative framework within which the various interested parties (i.e., airport proprietors, aircraft operators, local communities, counties and the state) can work together effectively to reduce and prevent airport noise problems.

**5011. Methodology for Controlling and Reducing Noise Problems.**

The methods whereby the impact of airport noise shall be controlled and reduced include but are not limited to the following:

(a) Encouraging use of the airport by aircraft classes with lower noise level characteristics and discouraging use by higher noise level aircraft classes;

(b) Encouraging approach and departure flight paths and procedures to minimize the noise in residential areas;

(c) Planning runway utilization schedules to take into account adjacent residential areas, noise characteristics of aircraft and noise sensitive time periods;

(d) Reduction of the flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft;

(e) Employing shielding for advantage, using natural terrain, buildings, et cetera; and

(f) Development of a compatible land use within the noise impact boundary.

Preference shall be given to actions which reduce the impact of airport noise on existing communities. Land use conversion involving existing residential communities shall normally be considered the least desirable action for achieving compliance with these regulations.

**5012. Airport Noise Criteria.**

Limitations on airport noise in residential communities are hereby established.

(a) The criterion community noise equivalent level (CNEL) is 65 dB for proposed new airports and for vacated military airports being converted to civilian use.

(b) Giving due consideration to economic and technological feasibility, the criterion community noise equivalent level (CNEL) for existing civilian airports (except as follows) is 70 dB until December 31, 1985, and 65 dB thereafter.

(c) The criterion CNEL for airports which have 4-

engine turbojet or turbofan air carrier aircraft operations and at least 25,000 annual air carrier operations (takeoffs plus landings) is as follows:

| *Date* | *CNEL in decibels* |
|---|---|
| Effective date of regulations to 12-31-75 | 80 |
| 1-1-76 to 12-31-80 | 75 |
| 1-1-81 to 12-31-85 | 70 |
| 1-1-86 and thereafter | 65 |

**5013. Noise Impact Boundary.**

The noise impact boundary at airports which have a noise problem as determined in accordance with Section 5050 shall be established and validated by measurement in accordance with the procedures given in Article 3 of this subchapter. For proposed new airports, or for anticipated changes of existing airports, the noise impact boundary shall be estimated by applicable acoustical calculation techniques.

The area of land which is within the noise impact boundary and which has incompatible land use is utilized as a measure of the magnitude of the noise problem at an airport. The concepts of noise impact boundary and noise impact area are illustrated in Figure 1.

**5014. Compatible Land Uses Within the Noise Impact Boundary.**

The criterion for the noise impact boundary was established for residential uses including single-family and multiple-family dwellings, trailer parks, and schools of standard construction. Certain other land uses may occur within the boundary but be compatible with the

community noise equivalent level and hence be excluded in the calculation of noise impact area. For this purpose, the following land uses are deemed compatible:

(a) Agricultural;

(b) Airport property;

(c) Industrial property;

(d) Commercial property;

(e) Property subject to a navigation easement for noise;

(f) Zoned open space;

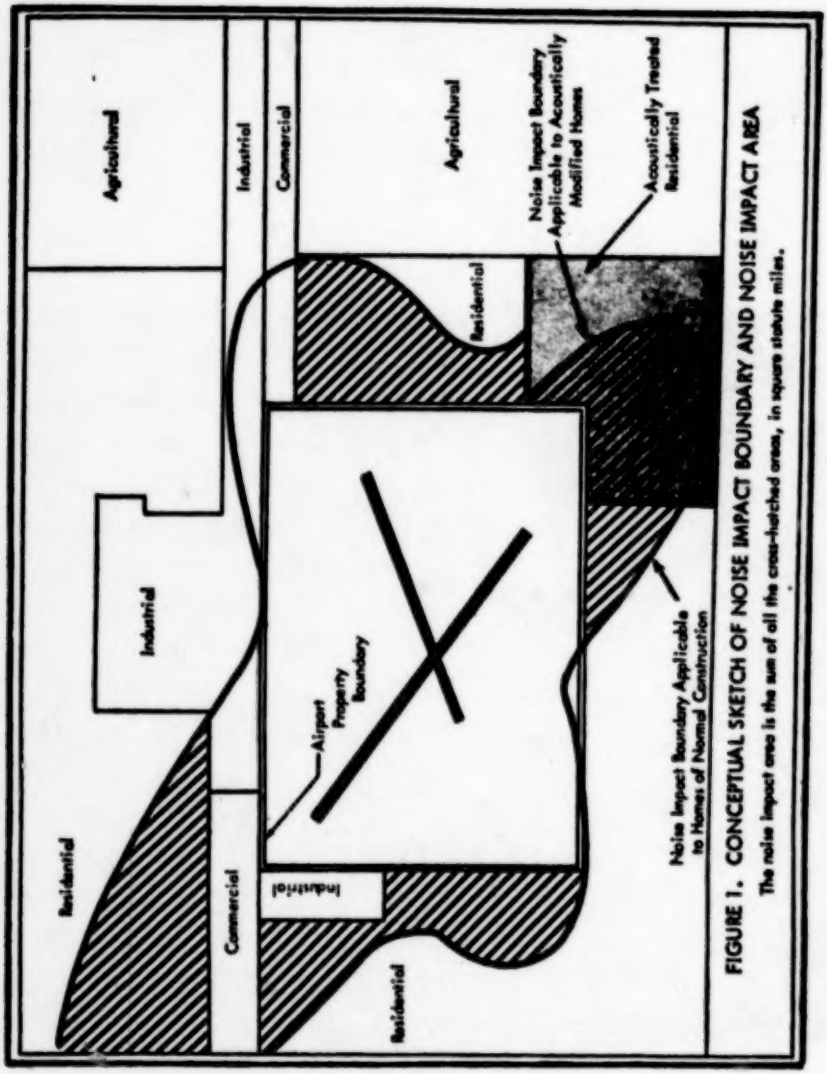



**FIGURE 1. CONCEPTUAL SKETCH OF NOISE IMPACT BOUNDARY AND NOISE IMPACT AREA**

(g) High rise apartments in which adequate protection against exterior noise has been included in the design and construction, together with a central air conditioning system. Adequate protection means the noise reduction (exterior to interior) shall be sufficient to assure that interior community noise equivalent level in all habitable rooms does not exceed 45 dB during aircraft operations. Acoustical performance of the buildings shall be verified by calculation or measured by qualified officials of the building inspection agency of the city or county in which the buildings are situated;

(h) In the case of existing airports and existing homes only, residential areas in which existing homes have been acoustically treated need not be subject to exterior noise limits quite as strict as those for normal residential construction. For this purpose, the community noise equivalent level on the boundary of such a residential area may be increased by as much as 15 dB over the community noise equivalent level criterion for non-acoustically treated homes. The amount of the increase allowed on the boundary is the difference between the noise level reduction of the treated home and the value 20 decibels which is assumed to be the noise level reduction of an average normal residence. The noise level reduction of a home is defined as the average difference between aircraft noise levels in free space outside of the home and the corresponding noise levels in rooms on the exposed sides of the home.

In carrying out this section, the actual use to which the land is put, not the classification for which the land is zoned, is determinative.

**5015. Changes in Airport Ownership or Control.**

In the case of a change in airport ownership or control, the new airport proprietor shall be deemed to be in full compliance with these regulations until such time as the department takes final action on the new proprietor's application for a variance in accordance with Article 13, provided, however, that the new proprietor complies with the following:

(a) The new proprietor shall make application to the department for a variance within twenty (20) days after assuming ownership or control, and

(b) The new proprietor, in operating the airport, shall not permit or authorize any activity in conjunction with the airport which results in an increase of the size of the noise impact area.

NOTE: Authority cited: Section 21243, Public Utilities Code. Reference: Sections 21669–21669.5, Public Utilities Code.

HISTORY:

1. New section filed 5-30-78 as an emergency, effective upon filing (Register 78, No. 22).
2. Certificate of Compliance filed 9-22-78 (Register 78, No. 38).

## Article 3. Establishing and Validating Noise Impact Boundaries for Airports Required to Monitor

**5020. Validation of the Noise Impact Boundary.**

For airports with a noise problem (in accordance with Section 5050), the noise impact boundary shall be validated by measurements made at locations specified in Section 5021 and according to frequency requirements specified in Section 5022. These measurements shall be utilized to calculate the daily community noise equivalent levels. These daily CNEL values will then be aver-

aged (on an energy basis) to obtain the annual CNEL at each of the community measurement locations. The location of the noise impact boundary will be considered valid if the value of the annual CNEL lies within ±1.5 dB of the criterion value.

**5021. Community Measurement Locations.**

At least twelve (12) locations, approximately equidistant, but not exceeding one and one-half (1.5) statute miles separation, shall be selected along the noise impact boundary. The locations shall be selected such that the maximum extent of the boundary be determined with reference to the airport's flight patterns.

**5022. Frequency of Measurement at Community Locations.**

(a) For airports with 1,000 or more homes within the noise impact boundary based on a CNEL of 70 dB, continuous monitoring is required at those monitoring positions which fall within residential areas. Measurement for at least 48 weeks in a year shall be considered as continuous monitoring.

(b) For all other locations and for all locations at other airports, an intermittent monitoring schedule is allowed. The intermittent monitoring schedule shall be designed so as to obtain the resulting annual CNEL as computed from measurements at each location which will correspond to the value which would be measured by a monitor operated continuously throughout the year at that location, within an accuracy of ±1.5 dB.

Thus, it is required that the intermittent monitoring schedule be designed so as to obtain a realistic statistical sample of the noise at each location. As a minimum, this

requires that measurements be taken continuously for 24-hour periods during four 7-day samples throughout the year, chosen such that for each sample, each day of the week is represented, the four seasons of the year are represented, and the results account for the effect of annual proportion of runway utilization. At most airports, these intermittent measurements can be accomplished by a single portable monitoring instrument.

**5023. Initial Establishment of the Noise Impact Boundary.**

The method to be used for initial establishment of the noise impact boundary of airports required to monitor will vary depending upon specific situations. The following guidelines represent one possible method:

(a) Calculate the approximate location of the noise impact boundary using applicable acoustic estimation techniques.

(b) Select convenient measurement locations on this estimated boundary according to Section 5021.

(c) Make a suitable series of CNEL trial measurements along lines perpendicular to the estimated noise impact boundary. For example, two to three measurements over a one-to-seven-day period along a line perpendicular to the estimated noise impact boundary should provide sufficient data to define, within the required accuracy, the nominal position of the noise impact boundary.

Due consideration should be given to the number and time period of aircraft operations, mix of aircraft classes, average runway utilization and other measureable factors which would cause a difference between the trial

measurements of CNEL and the expected annual average.

(d) Initiate validation measurements of the noise impact boundary following selection of permanent or intermittent monitoring locations to comply with the validation accuracy criterion specified in Section 5020. For permanent measurement locations at which the measured CNEL lies outside this accuracy criterion, suitable auxiliary measurements or analytical methods may be used to extrapolate the measured CNEL to determine the value on the noise impact boundary. Such extrapolation procedures are subject to approval by the department.

**5024. Deviations from Specified Measurement Locations.**

Recognizing the unique geographic and land use features surrounding specific airports, the department will consider measurement plans tailored to fit any airport for which the specified CNEL monitoring locations are impractical. For example, monitors should not be located on bodies of water or at points where other noise sources might interfere with aircraft CNEL measurements, nor are measurements required in regions where land use will clearly remain compatible.

**5025. Alternative Measurement Systems.**

The acquisition of measurement systems that are more extensive or scientifically more refined than those specified herein is encouraged, particularly at airports with a major noise problem, where compliance with the intent of Section 5075(a)(4) requires more comprehensive noise monitoring, particularly to monitor noise

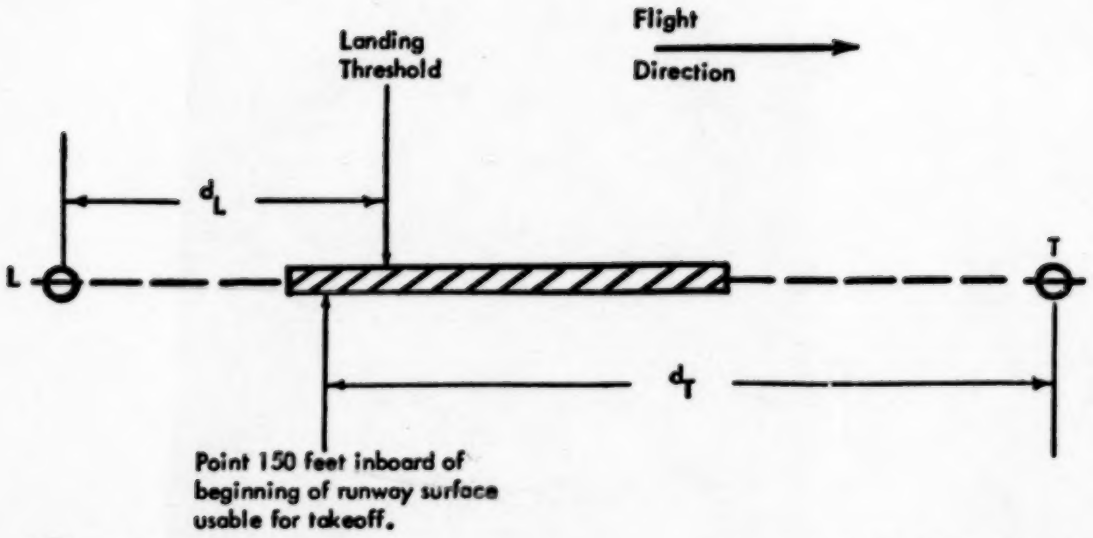
abatement procedures. Airports contemplating the acquisition of such monitoring systems may apply to the department for exemptions from specific monitoring requirements set forth in this subchapter of these regulations.

## Article 4. Measurement of Single Event Noise Exposure Level

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Repealer of Article 4 (Sections 5030–5032) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21). For history of former article, see Register 77, No. 10.




Microphone Locations

Centerline of Nominal Takeoff or Landing Flight Track

L - Landing

T - Takeoff

$d_L$ = 2500 feet to 1.0 Nautical Mile

$d_T$ = 10,000 feet to 3.5 Nautical Miles (see Figure 3a.)

**FIGURE 2. SINGLE EVENT NOISE EXPOSURE LEVEL MONITORING POSITIONS**

## Article 5. Single Event Noise Limits

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1965) 389 F.Supp. 58.

HISTORY:

1. Repealer of Article 5 (Section 3035) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21). For history of former article, see Register 77, No. 10.

## Article 6. Additional Monitoring Locations

**5040. Additional Monitoring Locations.**

For airports which are required to monitor, additional monitoring locations may be useful in some cases. These additional locations may be utilized for measurement of either single event noise exposure levels (such as monitoring of noise abatement flight procedures) or community noise equivalent levels (such as at fixed points in high noise level residential areas). The frequency of measurement at these additional monitoring locations should be determined on the basis of each specific situation.

## Article 7. Noise Monitoring System Requirements

**5045. General Specifications.**

(a) The noise monitoring system shall provide for the following outputs:

(1) In community (see Section 5020). Hourly noise level for each hour of the day, together with identification of the hour.

(b) The overall accuracy of the noise measurement system shall be $\pm 1.5$ dB, determined in accordance with the procedure of the noise measurement system specification given in Sections 5080 through 5080.5 of these regulations.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment of subsection (a) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5046. Detailed Specifications.**

Noise monitoring systems shall be in accordance with detailed specifications given in Sections 5080 through 5080.5 of these regulations.

**5047. Field Measurement Precautions.**

Specific locations of the monitoring system, particularly for the community measurement locations, shall be chosen, whenever possible, such that the community noise equivalent level at the location from sources other than aircraft in flight be equal to or less than 55 dB. This objective may be satisfied by selecting the location such that it is in a residential area not immediately adjacent to a noisy industry, freeway, railroad track, et cetera. The measurement microphone shall be placed 20 feet above the ground level, or at least 10 feet above neighboring roof tops, whichever is higher. To the extent practicable, the following precautions shall be followed:

(a) No obstructions which significantly influence the sound field from the aircraft shall exist within a conical space above the measurement position, the cone being defined by an axis along a line of sight normal to the aircraft path and by a half angle of 75 degrees from this axis.

(b) When the foregoing precautions are not practicable, the microphones shall be placed at least 10 feet above neighboring buildings in a position which has a clear line-of-sight view to the path of the aircraft in flight.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5048. Number of Measurement Systems.**

The frequency of measurement specified in Section 5022 has been designed to limit the number of monitoring systems required. The minimum number of systems required per airport is one for intermittent measurements of the noise impact boundary.

This minimum number will increase where necessary to conform to the requirement that separation distance between monitoring positions on the boundary not exceed one and one-half (1.5) statute miles or when continuous measurements are required on the measurement boundary in accordance with Section 5022.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

## Article 8. Implementation by Counties

**5050. Counties.**

(a) The county wherein an airport is situated shall enforce this subchapter of these regulations.

(b) In recognition of the requirement to allow the maximum amount of local control and enforcement of this regulation, the county shall determine which of the airports within its boundaries are required to initiate aircraft noise monitoring in accordance with these regulations. The county shall require noise monitoring by the airports within its boundaries that are deemed to have

a noise problem as determined by the county. For airports with joint use by both military and civilian aircraft operations, the determination of the existence of a noise problem shall be based upon the civilian operations. In making a determination that a noise problem exists around an airport, the county shall:

(1) Investigate the possible existence of a noise impact area greater than zero based on a CNEL of 70 dB, and determine whether or not people actually reside inside the noise impact boundary;

(2) Review other information that it may deem relevant, including but not limited to complaint history and legal actions brought about by aircraft noise; and

(3) Coordinate with, and give due consideration to the recommendations of, the county airport land use commission (as defined in Public Utilities Code Section 21670).

(c) Any affected or interested person or any government agency disagreeing with the county's findings regarding the existence of a noise problem at a given airport may file an appeal with the department. Upon receipt of such an appeal, the department shall make an investigation and determination as to the validity of the county's findings. The department shall serve by mail the written record of such investigation and determination to the county, the airport proprietor, and the affected or interested person or governmental agency. If the department finds that the county's determination does not correspond to the facts, the county shall adhere to the determination of the department. Whenever the

department has served such record, the county, airport proprietor, affected or interested person, or government agency may in writing within 10 days demand a hearing. In such case, the department shall file a statement of issues and shall conduct proceedings in accordance with the Administrative Procedure Act (Chapter 5, Part 1, Division 3, Title 2, Government Code).

(d) For all airports required to perform noise monitoring, the counties shall validate monitoring data supplied by the airport proprietor and shall enforce these regulations in all respects.

(e) The county shall submit quarterly reports to the Department of Aeronautics. Each report is due 45 days after the end of the quarter of the calendar year covered in the report. The report shall contain at least the following information on each airport within the county covered by these regulations:

(1) A map illustrating the location of the noise impact boundary, as validated by measurement, and the location of measurement points, in the four preceding quarters;

(2) The annual noise impact area as obtained from the preceding four calendar quarters, and as obtained in accordance with Article 2 of this subchapter of these regulations;

(3) The daily CNEL measurements, together with identification of the dates on which each measurement was made, number of total aircraft operations during the quarter, estimated number of operations of the highest noise level aircraft class in the quarter, and any other

data which is pertinent to the activity during the quarter. In addition, the HNL data shall be retained for at least 3 years, and made available to the department upon request; and

(f) The department will maintain in file, for a period of at least 3 years, all the noise data received pursuant to these regulations. These records shall be maintained in accordance with the provisions of the California Public Records Act (Chapter 3.5, Division 1, Title 1, Government Code).

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment filed 5-23-79; effective thirtieth day thirtieth day thereafter (Register 79, No. 21).

## Article 9. Implementation by Aircraft Operators

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Repealer of Article 9 (Section 5055) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21). For history of former article, see Register 77, No. 10.

## Article 10. Implementation by Airport Proprietors

**5060. Monitoring Requirements.**

(a) All airport proprietors shall cooperate with the county in the county's investigations to determine the existence of a noise problem, and shall furnish such data as the county may require.

(b) Each airport proprietor whose airport is determined to have a noise problem shall measure, establish and validate noise impact boundaries, monitor as required in Articles 3, 4 and 7 of this subchapter of these regulations, and shall furnish such data as the county may require.

**5061. Single Event Noise Limit Violations.**

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Repealer filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21). For history of former section, see Register 77, No. 10.

**5062. Noise Impact Area Violations.**

No airport proprietor shall operate his airport with a noise impact area of other than zero unless said operator has a variance as prescribed in Article 13 of this subchapter of these regulations.

**5063. Submittal of Monitoring Plan.**

Each airport proprietor who is required to perform noise monitoring shall submit a description of his monitoring plan to the county and to the department for approval. Such descriptions shall contain at least the following information:

(a) The general monitoring system plan, including at least locations and instrumentation;

(b) Justification for any proposed deviations from the measurement system locations specified in these regulations;

(c) Statistical sampling plan proposed for intermittent monitoring at community locations;

(d) Additional information as pertinent or as requested by the department.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5064. Grounds for Approval.**

Failure of the airport proprietor to comply with the provisions of Subchapter 6 of these regulations consti-

tutes a ground for denial of approval of an airport site within the meaning of Public Utilities Code, Section 21666.

## Article 11. Implementation by the Department

**5065. Implementation by the Department.**

The department will review the data submitted quarterly by the counties for the purpose of assessing the degree of compliance with this subchapter of these regulations. The department's review will include, but not be limited to, observation of any changes in boundary monitor positions and any changes in numerical values of CNEL.

## Article 12. Schedule of Implementation

**5070. Schedule of Implementation.**

(a) For airports in existence on the effective date of this subchapter of these regulations, counties shall complete their determination of whether or not a noise problem exists within the shortest feasible time after the effective date of these regulations. In no event shall the time for completion of this determination exceed 6 months from the effective date of these regulations.

(b) Each proprietor of an airport that has a noise problem, upon receipt of notification from the county, shall initiate noise monitoring within the shortest feasible time not to exceed 6 months in accordance with this subchapter of these regulations and concurrently shall make application to the department for a temporary variance in accordance with Article 13.

## Article 13. Variances

**5075. Variances.**

(a) In granting variances, the department shall be guided by the underlying intent of these regulations as follows:

(1) That the noise impact area surrounding proposed new airports be zero;

(2) That the proprietor of each existing airport having a surrounding noise impact area of zero based on a CNEL of 70 dB take actions to prevent a noise impact area of greater than zero;

(3) That the proprietor of each existing airport having a surrounding noise impact area of greater than zero based on a CNEL of 70 dB take actions to prevent an increase of the airport's noise impact area; and

(4) That the proprietor of each existing airport having a surrounding noise impact area of greater than zero based on a CNEL of 70 dB be required to develop and implement programs to reduce the noise impact area of the airport to an acceptable degree in an orderly manner over a reasonable period of time.

(b) An airport proprietor may request variances from the requirements of any or all of these regulations, except for Sections 5012 and 5013, for periods of not exceeding one year as set forth hereinafter:

(1) The airport proprietor shall apply to the department for a variance.

(2) Such application for variance shall be made upon a form which the department shall make available.

(3) Such application shall set forth the reasons why the airport proprietor believes said variance is neces-

sary. The application shall state the future date by which the airport proprietor expects to achieve compliance with the regulations from which a variance is sought. The application shall set forth an incremental schedule of noise impact area reductions for the intervening time.

(4) The department may grant a variance if the public interest would be satisfied by such a variance. In weighing the public interest, the department's considerations include but are not limited to the following:

(A) The economic and technological feasibility of complying with the noise standards set by these regulations;

(B) The noise impact should the variance be granted;

(C) The value to the public of the services for which the variance is sought; and

(D) Whether the airport proprietor is taking *bona fide* measures to the best of his ability to achieve the noise standards set by these regulations.

(5) The burden of proof shall be upon the applicant for a variance.

(6) On its own motion, or upon the request of an affected or interested person, the department shall hold a public hearing in connection with the approval of an application for a variance. Any interested person may obtain from the department information on pending requests for variances at any time.

(7) The department in granting a variance may impose reasonable conditions which it deems necessary to effectuate the purposes of this subchapter of these regulations.

(8) In the event a variance has been granted, and it reasonably appears that the airport proprietor cannot within the term of the variance achieve compliance with the requirements for which the variance was granted, any application for a further variance from such requirement must be made not less than thirty days before the termination date of the prior variance. In the event timely application is made under the provisions of this subparagraph, the prior variance shall continue in effect until the department acts on the application.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Section 21669, Public Utilities Code.

HISTORY:

1. New subsection (b) (8) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

## Article 14. Specification: Noise Monitoring System

**5080. Purpose and Scope.**

(a) Purpose. This specification establishes the minimum requirements for instrumentation to be utilized by agencies required to monitor aircraft noise in accordance with Articles 1 through 13 of this subchapter of these regulations.

(b) Scope. The measurement systems defined herein shall be utilized to monitor noise levels at specifically designated locations in the community surrounding the airport.

(c) Design Goals. The design goals for the monitor system are accuracy, reliability, and ease of maintenance. The measurement techniques set forth are sufficiently uncomplicated so that current state-of-the-art instrumentation equipment may be utilized to configure the two systems. Analysis and recording techniques

between community and runway monitor systems vary; however, this specification delineates a procedure whereby maximum commonality of systems elements may be achieved. The monitor system specifications are not intended to be unduly restrictive in specifying individual system components. The specifications allow the utilization of equipment ranging from analog systems to automated computer systems. The exact configuration will depend upon the specific monitoring requirement and the nature of existing user instrumentation.

This is a total systems specification. It is the prerogative of the user to configure the system with components which will be most compatible with his existing equipment and personnel.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment of subsection (b) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5080.1. Additional Definitions Applicable to Article 14.**

(a) Field Instrumentation. Refers to those elements of a noise monitoring system that are exposed to the outdoor environment in the vicinity of the measurement microphone. This equipment must function within specification during exposure to a year-around environment adjacent to any airport licensed by the state of California.

(b) Centralized Instrumentation. Refers to those elements of the noise monitoring system which will be contained in an environmentally-controlled room.

(c) HNL Monitoring System. The HNL monitoring system shall measure the hourly noise level and shall

provide identification of the hour. This system shall be deployed as a community monitoring system. An HNL system consists of two subsystems: a noise level subsystem and an integrator/logger subsystem.

(d) Noise Level Subsystem. This term defines a subsystem composed of a microphone, an A-weighted filter, a squaring circuit and a lag network. This subsystem is used to derive a signal representing the mean square, A-weighted value of acoustic pressure.

(e) Integrator/Logger Subsystem. This term defines a subsystem composed of a threshold comparator, an integrator, a clock, an accumulator, a logger or printer and a logarithmic converter. This subsystem shall be used to transform the output from a noise level subsystem in excess of a pre-set threshold into HNL.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5080.2. Examples of Possible System Configurations.**

(a) Approach. The system that has been defined is the HNL monitoring system. There are many possible methods of configuring systems to produce HNL data. These systems may be analog systems, digital systems, or combined analog and digital systems. Figure 4 illustrates a configuration which can provide HNL measurements. The system configuration described herein is presented for information only and not as specific design criteria.

(b) HNL System Configuration. An HNL system may be composed of the following elements:

(1) Noise Level Subsystem. The HNL noise level subsystem may be configured as follows:

(A) Microphone. The microphone converts acoustic data to an equivalent electrical voltage.

(B) A-Weighting Filter Network. This filter modifies the voltage from the microphone system so that its frequency characteristics are shaped to an A-weighted, relative response in accordance with weighting curve A in ASA S1.4-1961, or latest revision thereof.

(C) Squaring Circuit. This circuit provides a continuous, instantaneous square of the value of the electrical signal delivered from the A-weighting network.

(D) Lag Network. This circuit may be a first order lag (single-pole filter) used to smooth the output of the squaring circuit for delivery to subsequent circuits. The lag network provides a slow dynamic characteristic as defined for a sound level meter in ASA S1.4-1961, or latest revision thereof.

(2) HNL Integrator/Logger Subsystem. The HNL integrator/logger subsystem may be configured as follows:

(A) Threshold Comparator. This device generates an output signal during the time its input exceeds an adjustable, pre-set threshold level.

(B) Integrator. This circuit provides an output signal which is the definite time-integral of the input signal. The input is a slowly-varying, smooth, unipolar signal delivered from the lag network. The integrator has three operational states: integrate or run, hold, or reset. These states would be controlled by the threshold-comparator. Initially, before the integrator input signal

exceeds the threshold signal, the integrator is held in reset. When the threshold is exceeded, the integrator is set in the integrate state, causing the output to be the time-integral of the input. When the input next falls below the threshold, the integrator is set into the hold state. The output of the integrator is, at hold time, the time-integral of the input while it exceeded the measurement threshold. The integrator is controlled in its reset, run, and hold states so that (1) it integrates for some fixed period of time, e.g., 60 seconds, (2) it "holds" only long enough to transfer out the output value for that fixed period integration, and (3) it "resets" only long enough to return the output to zero so that another "integrate" period may be initiated.

(C) Sample and Hold (Optional). This circuit may be used to store the value of the integral at the time of integrator hold to minimize the time required for the integrator to be maintained in hold.

(D) Clock. This device controls the timing of the integrator and the accumulator readout.

(E) Logarithmic Converter (Optional). This element is used to convert the accumulated integrated noise level to a logarithmic quantity proportional to HNL.

(F) Logging Element. This element may be a printer which can concurrently or sequentially print out values of true time and HNL.

(G) Accumulator. This device is used to store the output of the integrator for all events exceeding the threshold level within a 3600 second period. A print

command signal is also provided on the hour to the logger/printer at one hour intervals.

(c) Integrator/Logger Subsystem.

(1) Threshold Comparator. For HNL, the threshold level shall be adjustable over a noise level range of at least 55 to 70 dB. Threshold triggering shall be repeatable within ±0.5 dB.

(2) Clock. The clock shall be capable of being set to the time of day within an accuracy of 10 seconds and shall not drift more than 20 seconds in a 24-hour period.

(3) End-to-End Accuracy. The end-to-end accuracy of the integrator/logger subsystem is defined in terms of a unipolar, positive-going square wave input. The logged, integrated output of the system should fall within ±1 dB of the true value predicted for the wave of a given duration at an amplitude exceeding the measurement threshold by at least 10 dB, and at all higher amplitudes within the range. The square wave shall be applied at the input to the integrator and level comparator.

(A) HNL Integrator/Logger Subsystem.

1. For each hour during which no noise event exceeds the HNL system noise level threshold the subsystem shall output the time on the hour, and indicate that the antilog of the HNL for the preceding hour is zero.

2. The end-to-end accuracy shall be determined over the range of HNL from 45 dB to 95 dB for each combination of the following conditions which gives a value in this range:

a. Square waves, as defined above, shall have durations of 1, 3, 10, 30 and 100 cycles.

b. Square waves shall be at frequencies of 0.025, 0.05, 0.10 and 0.20 Hz.

c. Square waves shall have amplitudes which are equivalent to noise levels of 70, 80, 90, 100 and 110 dB.

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Amendment filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5080.3. Performance Specifications.**

(a) Overall Accuracy. The overall accuracy of both systems shall be ±1.5 dB when measuring noise from aircraft in flight. It is the intent of the following specifications to verify this accuracy with laboratory simulation.

(b) Noise Level Subsystem.

(1) Frequency Response and Microphone Characteristics. The frequency response, and associated tolerance of the subsystem, shall be in accordance with IEC Publication 179 entitled "Precision Sound Level Meters," paragraphs 4, 5 and 8 for the A-weighting network, to be superseded by the specifications for the Type 1 precision sound level meter in the latest revision of ASA S1.4-1961, when available.

(2) Dynamic Range. The system output shall be proportional to the antalog of the noise level over a noise level range of 60 dB to 120 dB.

(A) For the SENEL subsystem, this range may be covered in 30 dB or greater increments through the use of attenuators. The noise level for each attenuator range shall be at least 40 dB below full scale. Full scale range

shall apply to signals with a crest factor as great as 3:1.

(B) For the HNL subsystem, the internal electrical noise shall not exceed an equivalent input noise level of 50 dB, and the full scale range of 120 dB shall apply to signals with a crest factor as great as 3:1.

(3) Linearity. The electrical amplitude response to sine waves in the frequency range of 22.4 Hz to 11.200 Hz shall be linear within one decibel from 30 dB below each full scale range up to 7dB above the full scale range on any given range of the instrument.

(c) Integrator/Logger Subsystem.

(1) Threshold Comparator. For SENEL, the threshold level shall be selectable in steps of no greater than 10 dB over a noise level range of at least 60 to 90 dB. For HNL, the threshold level shall be adjustable over a noise level range of at least 55 to 70 dB. In both cases, threshold triggering shall be repeatable within ±0.5 dB.

(2) SENEL Comparator. The maximum allowable SENEL shall be selectable over an SENEL range of 85 to 125 dB. Comparator sensing shall be repeatable within ±0.5 dB.

(3) Clock. The clock shall be capable of being set to the time of day within an accuracy of 10 seconds and shall not drift more than 20 seconds in a 24-hour period. For SENEL, the clock output which identifies the start or stop time of the single event shall be readable within one second.

(4) End-to-End Accuracy. The end-to-end accuracy of the integrator/logger subsystem is defined in terms of a unipolar, positive-going square wave input. The

logged, integrated output of the system should fall within ±1 dB of the true value predicted for the wave of a given duration at an amplitude exceeding the measurement threshold by at least 10 dB, and at all higher amplitudes within the range. The square wave shall be applied at the input to the integrator and level comparator.

(A) SENEL Integrator/Logger Subsystem. For square waves defined at all frequencies between 0.025 and 1.0 Hz, the subsystem shall output the SENEL exceeding the maximum allowable SENEL and its time of occurrence to demonstrate end-to-end accuracy.

(B) HNL Integrator/Logger Subsystem.

1. For each hour during which no noise event exceeds the HNL system noise level threshold, the subsystem shall output the time on the hour, and indicate that the antilog of the HNL for the preceding hour is zero.

2. The end-to-end accuracy shall be determined over the range of HNL from 45 dB to 95 dB for each combination of the following conditions which gives a value in this range:

a. Square waves, as defined above, shall have durations of 1, 3, 10, 30 and 100 cycles.

b. Square waves shall be at frequencies of 0.025, 0.05, 0.10 and 0.20 Hz.

c. Square waves shall have amplitudes which are equivalent to noise levels of 70, 80, 90, 100 and 110 dB.

d. Overall System Accuracy Demonstration. The overall system accuracy shall be demonstrated for several conditions within each of the following ranges, util-

izing a 1000 Hz sinusoidal acoustic plane wave oriented along the preferred plane wave axis of the microphone, or an equivalent signal generated in an acoustic coupler:

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Repealer of subsection (d) (1) filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

**5080.4. Field Calibration.**

The monitoring system shall include an internal electrical means to electrically check and maintain calibration without resort to additional equipment. Provision shall also be made to enable calibration with an external acoustic coupler.

**5080.5. Environmental Precautions and Requirements.**

(a) The field instrumentation shall be provided with suitable protection such that the system performance specified will not be degraded while the system is operating within the range of weather conditions encountered at airports within the State of California.

(b) Humidity. The effect of changes in relative humidity on sensitivity of field instrumentation shall be less than 0.5 decibel at any frequency between 22.4 and 11,200 Hz in the range of 5 to 100 percent relative humidity.

(c) Vibration. The field instrumentation shall be designed and constructed so as to minimize the effects of vibration resulting from mechanical excitation. Shock mounting of the field instrumentation shall be provided as required to preclude degradation of system performance.

(d) Acoustic Noise. The field instrumentation shall

be designed and constructed so as to minimize effects of vibration resulting from airborne noise, and shall operate in an environment of 125 dB SPL—broadband noise over a frequency range of 22.4 to 11,200 Hz—without degradation of system performance.

(e) Magnetic and Electrostatic. The effects of magnetic and electrostatic fields shall be reduced to a minimum. The magnitude of such fields which would degrade the performance of the system in accordance with the specifications in Section 5080.3 shall be determined and stated.

(f) Windscreen. A windscreen suitable for use with the microphone shall be used at all times. The windscreen shall be designed so that for windspeeds of 20 miles per hour or less, the overall accuracy of the measurement system specified in Section 5080.3(a) is not compromised.

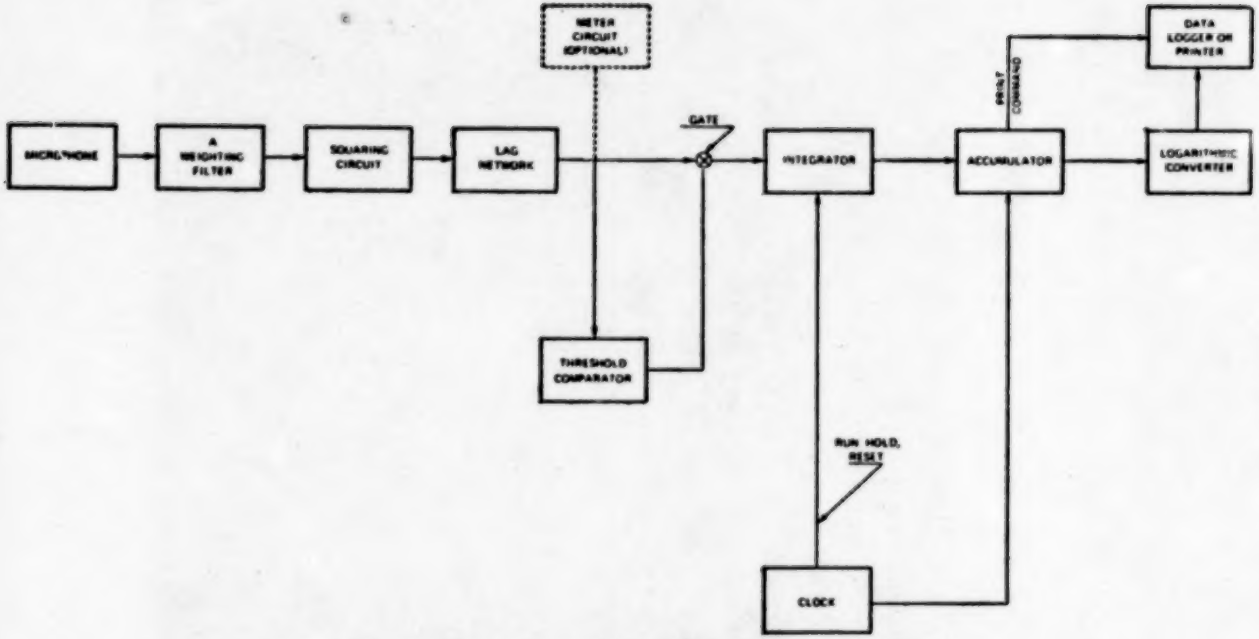



**FIGURE 4. TYPICAL HOURLY NOISE LEVEL (HNL) SYSTEM**

NOTE: Authority cited: Sections 21243 and 21669, Public Utilities Code. Reference: Air Transport Association of America v. Crotti (N.D.Cal. 1975) 389 F.Supp. 58.

HISTORY:

1. Repealer of Figure 4, and renumbering of Figure 5 to Figure 4 filed 5-23-79; effective thirtieth day thereafter (Register 79, No. 21).

# APPENDIX H

# APPENDIX H

## PUBLIC LAW 92-574; 86 STAT. 1234 (1972)

## NOISE CONTROL ACT OF 1972

**[Provisions Involved.]**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:*

### SHORT TITLE

Section 1. This Act may be cited as the "Noise Control Act of 1972".

### FINDINGS AND POLICY

Sec. 2. [42 U.S.C. § 4901.] (a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this Act to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide infor-

mation to the public respecting the noise emission and noise reduction characteristics of such products.

## DEFINITIONS

Sec. 3. [42 U.S.C. § 4901.] For purposes of this Act:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "person" means an individual, corporation, partnership, or association, and (except as provided in sections 11(e) and 12(a)) includes any officer, employee, department, agency, or instrumentality of the United States, a State, or any political subdivision of a State.

(3) The term "product" means any manufactured article or goods or component thereof; except that such term does not include—

(A) any aircraft, aircraft engine, propeller, or appliance, as such terms are defined in section 101 of the Federal Aviation Act of 1958; or

(B) (i) any military weapons or equipment which are designed for combat use; (ii) any rockets or equipment which are designed for research, experimental, or developmental work to be performed by the National Aeronautics and Space Administration; or (iii) to the extent provided by regulations of the Administrator, any other machinery or equipment designed for use in experimental work done by or for the Federal Government.

(4) The term "ultimate purchaser" means the first person who in good faith purchases a product for purposes other than resale.

(5) The term "new product" means (A) a product

the equitable or legal title of which has never been transferred to an ultimate purchaser, or (B) a product which is imported or offered for importation into the United States and which is manufactured after the effective date of a regulation under section 6 or section 8 which would have been applicable to such product had it been manufactured in the United States.

(6) The term "manufacturer" means any person engaged in the manufacturing or assembling of new products, or the importing of new products for resale, or who acts for, and is controlled by, any such person in connection with the distribution of such products.

(7) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(8) The term "distribute in commerce" means sell in, offer for sale in, or introduce or deliver for introduction into, commerce.

(9) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

(10) The term "Federal agency" means an executive agency (as defined in section 105 of title 5, United States Code) and includes the United States Postal Service.

(11) The term "environmental noise" means the intensity, duration, and the character of sounds from all sources.

## FEDERAL PROGRAMS

Sec. 4. [42 U.S.C. § 4903.] (a) The Congress authorizes and directs that Federal agencies shall, to the fullest extent consistent with their authority under Federal laws administered by them, carry out the programs within their control in such a manner as to further the policy declared in section 2(b).

(b) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government—

(1) having jurisdiction over any property or facility, or

(2) engaged in any activity resulting, or which may result, in the emission of noise,

shall comply with Federal, State, interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements. The President may exempt any single activity or facility, including noise emission sources or classes thereof, of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption, other than for those products referred to in section 3(3)(B) of this Act, may be granted from the requirements of sections 6, 17, and 18 of this Act. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to

make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

(c) (1) The Administrator shall coordinate the programs of all Federal agencies relating to noise research and noise control. Each Federal agency shall, upon request, furnish to the Administrator such information as he may reasonably require to determine the nature, scope, and results of the noise-research and noise-control programs of the agency.

(2) Each Federal agency shall consult with the Administrator in prescribing standards or regulations respecting noise. If at any time the Administrator has reason to believe that a standard or regulation, or any proposed standard or regulation, of any Federal agency respecting noise does not protect the public health and welfare to the extent he believes to be required and feasible, he may request such agency to review and report to him on the advisability of revising such standard or regulation to provide such protection. Any such request may be published in the Federal Register and shall be accompanied by a detailed statement of the informaon on which it is based. Such agency shall complete the requested review and report to the Administrator with-

in such time as the Administrator specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The report shall be published in the Federal Register and shall be accompanied by a detailed statement of the findings and conclusions of the agency respecting the revision of its standard or regulation. With respect to the Federal Aviation Administration, section 611 of the Federal Aviation Act of 1958 (as amended by section 7 of this Act) shall apply in lieu of this paragraph.

(3) On the basis of regular consultation with appropriate Federal agencies, the Administrator shall compile and publish, from time to time, a report on the status and progress of Federal activities relating to noise research and noise control. This report shall describe the noise-control programs of each Federal agency and assess the contributions of those programs to the Federal Government's overall efforts to control noise.

## IDENTIFICATION OF MAJOR NOISE SOURCES; NOISE CRITERIA AND CONTROL TECHNOLOGY

Sec. 5. [42 U.S.C. § 4904.] (a) (1) The Administrator shall, after consultation with appropriate Federal agencies and within nine months of the date of the enactment of this Act, develop and publish criteria with respect to noise. Such criteria shall reflect the scientific knowledge most useful in indicating the kind and extent of all identifiable effects on the public health or welfare which may be expected from differing quantities and qualities of noise.

(2) The Administrator shall, after consultation with

appropriate Federal agencies and within twelve months of the date of the enactment of this Act, publish information on the levels of environmental noise the attainment and maintenance of which in defined areas under various conditions are requisite to protect the public health and welfare with an adequate margin of safety.

(b) The Administrator shall, after consultation with appropriate Federal agencies, compile and publish a report or series of reports (1) identifying products (or classes of products) which in his judgment are major sources of noise, and (2) giving information on techniques for control of noise from such products, including available data on the technology, costs, and alternative methods of noise control. The first such report shall be published not later than eighteen months after the date of enactment of this Act.

(c) The Adminisrator shall from time to time review and, as appropriate, revise or supplement any criteria or reports published under this section.

(d) Any report (or revision thereof) under subsection (b) (1) identifying major noise sources shall be published in the Federal Register. The publication or revision under this section of any criteria or information on control techniques shall be announced in the Federal Register, and copies shall be made available to the general public.

## NOISE EMISSION STANDARDS FOR PRODUCTS DISTRIBUTED IN COMMERCE

Sec. 6. [42 U.S.C. § 4905.] (a) (1) The Administrator shall publish proposed regulations, meeting the re-

quirements of subsection (c), for each product—

(A) which is identified (or is part of a class identified) in any report published under section 5(b) (1) as a major source of noise.

(B) for which, in his judgment, noise emission standards are feasible, and

(C) which falls in one of the following categories:

(i) Construction equipment.

(ii) Transportation equipment (including recreational vehicles and related equipment).

(iii) Any motor or engine (including any equipment of which an engine or motor is an integral part).

(iv) Electrical or electronic equipment.

(2) (A) Initial proposed regulations under paragraph (1) shall be published not later than eighteen months after the date of enactment of this Act, and shall apply to any product described in paragraph (1) which is identified (or is a part of a class identified) as a major source of noise in any report published under section 5(b) (1) on or before the date of publication of such initial proposed regulations.

(B) In the case of any product described in paragraph (1) which is identified (or is part of a class identified) as a major source of noise in a report published under section 5(b) (1) after publication of the initial proposed regulations under subparagraph (A) of this paragraph, regulations under paragraph (1) for such product shall be proposed and published by the Administrator not later than eighteen months after such report is published.

(3) After proposed regulations respecting a product have been published under paragraph (2), the Administrator shall, unless in his judgment noise emission standards are not feasible for such product, prescribe regulations, meeting the requirements of subsection (c), for such product—

(A) not earlier than six months after publication of such proposed regulations, and

(B) not later than—

(i) twenty-four months after the date of enactment of this Act, in the case of a product subject to proposed regulations published under paragraph (2)(A), or

(ii) in the case of any other product, twenty-four months after the publication of the report under section 5(b)(1) identifying it (or a class of products of which it is a part) as a major source of noise.

(b) The Administrator may publish proposed regulations, meeting the requirements of subsection (c), for any product for which he is not required by subsection (a) to prescribe regulations but for which, in his judgment, noise emission standards are feasible and are requisite to protect the public health and welfare. Not earlier than six months after the date of publication of such proposed regulations respecting such product, he may prescribe regulations, meeting the requirements of subsection (c), for such product.

(c) (1) Any regulation prescribed under subsection (a) or (b) of this section (and any revision thereof) respecting a product shall include a noise emission

standard which shall set limits on noise emissions from such product and shall be a standard which in the Administrator's judgment, based on criteria published under section 5, is requisite to protect the public health and welfare, taking into account the magnitude and conditions of use of such product (alone or in combination with other noise sources), the degree of noise reduction achievable through the application of the best available technology, and the cost of compliance. In establishing such a standard for any product, the Administrator shall give appropriate consideration to standards under other laws designed to safeguard the health and welfare of persons, including any standards under the National Traffic and Motor Vehicle Safety Act of 1966, the Clean Air Act, and the Federal Water Pollution Control Act. Any such noise emission standards shall be a performance standard. In addition, any regulation under subsection (a) or (b) (and any revision thereof) may contain testing procedures necessary to assure compliance with the emission standard in such regulation, and may contain provisions respecting instructions of the manufacturer for the maintenance, use, or repair of the product.

(2) After publication of any proposed regulations under this section, the Administrator shall allow interested persons an opportunity to participate in rulemaking in accordance with the first sentence of section 553(c) of title 5, United States Code.

(3) The Administrator may revise any regulation prescribed by him under this section by (A) publication of proposed revised regulations, and (B) the promulga-

tion, not earlier than six months, after the date of such publication, of regulations making the revision; except that a revision which makes only technical or clerical corrections in a reguation under this section may be promulgated earlier than six months after such date if the Administrator finds that such earlier promulgation is in the public interest.

(d) (1) On and after the effective date of any regulation prescribed under subsection (a) or (b) of this section, the manufacturer of each new product to which such regulation applies shall warrant to the ultimate purchaser and each subsequent purchaser that such product is designed, built, and equipped so as to conform at the time of sale with such regulation.

(2) Any cost obligation of any dealer incurred as a result of any requirement imposed by paragraph (1) of this subsection shall be borne by the manufacturer. The transfer of any such cost obligation from a manufacturer to any dealer through franchise or other agreement is prohibited.

(3) If a manufacturer includes in any advertisement a statement respecting the cost or value of noise emission control devices or systems, such manufacturer shall set forth in such statement the cost or value attributed to such devices or systems by the Secretary of Labor (through the Bureau of Labor Statistics). The Secretary of Labor, and his representatives, shall have the same access for this purpose to the books, documents, papers, and records of a manufacturer as the Comptroller Gen-

eral has to those of a recipient of assistance for purposes of section 311 of the Clean Air Act.

(e) (1) No State or political subdivision thereof may adopt or enforce—

(A) with respect to any new product for which a regulation has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator; or

(B) with respect to any component incorporated into such new product by the manufacturer of such product, any law or regulation setting a limit on noise emissions from such component when so incorporated.

(2) Subject to sections 17 and 18, nothing in this section precludes or denies the right of any State or political subdivision thereof to establish and enforce controls on environmental noise (or one or more sources thereof) through the licensing, regulation, or restriction of the use, operation, or movement of any product or combination of products.

[See appendix I, Quiet Communities Act of 1978, section 5 for added subparagraph (f).]

## AIRCRAFT NOISE STANDARDS

Sec. 7. (a) [42 U.S.C. § 4906.] The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of

identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after the date of the enactment of this Act.

(b) Section 611 of the Federal Aviation Act of 1958 (49 U.S.C. 1431) is amended to read as follows:

"CONTROL AND ABATEMENT OF AIRCRAFT NOISE AND SONIC BOOM

"Sec. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this

section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

"(2) The FAA shall not issue an original type certificate under section 603(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

"(c) (1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA

shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall—

"(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

"(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

"(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1) (A) (ii) or (1) (B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accom-

panied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA 's report indicates such action will be taken.

"(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

"(d) In prescribing and amending standards and regulations under this section, the FAA shall—

"(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of

research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

"(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

"(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

"(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

"(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

"(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation."

(c) All—

(1) standards, rules, and regulations prescribed under section 611 of the Federal Aviation Act of 1958, and

(2) exemptions, granted under any provision of the Federal Aviation Act of 1958, with respect to such standards, rules, and regulations,

which are in effect on the date of the enactment of this Act, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrator of the Federal Aviation Administration in the exercise of any authority vested in him, by a court of competent jurisdiction, or by operation of law.

[See Appendix I, Quiet Communities Act of 1978, section 3 for amendments.]

* * * * *

## RAILROAD NOISE EMISSION STANDARDS

Sec. 17. [42 U.S.C. § 4916.] (a) (1) Within nine months after the date of enactment of this Act, the Administrator shall publish proposed noise emission regulations for surface carriers engaged in interstate commerce by railroad. Such proposed regulations shall include noise emission standards setting such limits on noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance. These regulations shall be in addition to any regulations that may be proposed under section 6 of this Act.

(2) Within ninety days after the publication of such regulations as may be proposed under paragraph (1) of

this subsection, and subject to the provisions of section 16 of this Act, the Administrator shall promulgate final regulations. Such regulations may be revised, from time to time, in accordance with this subsection.

(3) Any standard or regulation, or revision thereof, proposed under this subsection shall be promulgated only after consultation with the Secretary of Transportation in order to assure appropriate consideration for safety and technological availability.

(4) Any regulation or revision thereof promulgated under this subsection shall take effect after such period as the Administrator finds necessary, after consultation with the Secretary of Transportation, to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(b) The Secretary of Transportation, after consultation with the Administrator, shall promulgate regulations to insure compliance with all standards promulgated by the Administrator under this section. The Secretary of Transportation shall carry out such regulations through the use of his powers and duties of enforcement and inspection authorized by the Safety Appliance Acts, the Interstate Commerce Act, and the Department of Transportation Act. Regulations promulgated under this section shall be subject to the provisions of sections 10, 11, 12, and 16 of this Act.

(c) (1) Subject to paragraph (2) but notwithstanding any other provision of this Act, after the effective date of a regulation under this section applicable to

noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any state or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

(d) The terms "carrier" and "railroad" as used in this section shall have the same meaning as such terms have under the first section of the Act of February 17, 1911 (45 U.S.C. 22).

## MOTOR CARRIER NOISE EMISSION STANDARDS

Sec. 18. [42 U.S.C. § 4917.] (a) (1) Within nine months after the date of enactment of this Act, the Administrator shall publish proposed noise emission regulations for motor carriers engaged in interstate commerce. Such proposed regulations shall include noise emission standards setting such limits on noise

emissions resulting from operation of motor carriers engaged in interstate commerce which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance. These regulations shall be in addition to any regulations that may be proposed under section 6 of this Act.

(2) Within ninety days after the publication of such regulations as may be proposed under paragraph (1) of this subsection, and subject to the provisions of section 16 of this Act, the Administrator shall promulgate final regulations. Such regulations may be revised from time to time, in accordance with this subsection.

(3) Any standard or regulation, or revision thereof, proposed under this subsection shall be promulgated only after consultation with the Secretary of Transportation in order to assure appropriate consideration for safety and technological availability.

(4) Any regulation or revision thereof promulgated under this subsection shall take effect after such period as the Administrator finds necessary, after consultation with the Secretary of Transportation, to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(b) The Secretary of Transportation, after consultation with the Administrator shall promulgate regulations to insure compliance with all standards promulgated by the Administrator under this section. The Secretary of Transportation shall carry out such

regulations through the use of his powers and duties of enforcement and inspection authorized by the Interstate Commerce Act and the Department of Transportation Act. Regulations promulgated under this section shall be subject to the provisions of sections 10, 11, 12, and 16 of this Act.

(c) (1) Subject to paragraph (2) of this subsection but notwithstanding any other provision of this Act, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

(d) For purposes of this section, the term "motor carrier" includes a common carrier by motor vehicle, a contract carrier by motor vehicle, and a private carrier

of property by motor vehicle as those terms are defined by paragraphs (14), (15), and (17) of section 203(a) of the Interstate Commerce Act (49 U.S.C. 303(a)).

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# APPENDIX I

# APPENDIX I

## PUBLIC LAW 95-609; 92 STAT. 3079 (1978)

## QUIET COMMUNITIES ACT OF 1978

**[Provisions Involved.]**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Quiet Communities Act of 1978".

SEC. 2. Section 14 of the Noise Control Act of 1972 is amended to read as follows:

### "QUIET COMMUNITIES, RESEARCH, PUBLIC INFORMATION

"SEC. 14. [42 U.S.C. 4913.] To promote the development of effective State and local noise control programs, to provide an adequate Federal noise control research program designed to meet the objectives of this Act, and to otherwise carry out the policy of this Act, the Administrator shall, in cooperation with other Federal agencies and through the use of grants, contracts, and direct Federal actions—

"(a) develop and disseminate information and educational materials to all segments of the public on the public health and other effects of noise and the most effective means for noise control, through the use of materials for school curricula, volunteer organizations, radio and television programs, publication, and other means;

"(b) conduct or finance research directly or with any public or private organization or any person on the effects, measurement, and control of noise, including but not limited to—

"(1) investigation of the psychological and physiological effects of noise on humans and the effects of noise on domestic animals, wildlife, and property, and the determination of dose/response relationships suitable for use in decisionmaking, with special emphasis on the nonauditory effects of noise;

"(2) investigation, development, and demonstration of noise control technology for products subject to possible regulation under sections 6, 7, and 8 of this Act;

"(3) investigation, development, and demonstration of monitoring equipment and other technology especially suited for use by State and local noise control programs;

"(4) investigation of the economic impact of noise on property and human activities; and

"(5) investigation and demonstration of the use of economic incentives (including emission charges) in the control of noise;

"(c) administer a nationwide Quiet Communities Program which shall include, but not be limited to—

"(1) grants to States, local governments, and authorized regional planning agencies for the purpose of—

"(A) identifying and determining the nature and extent of the noise problem within the subject jurisdiction;

"(B) planning, developing, and establishing a noise control capacity in such jurisdiction, including purchasing initial equipment;

"(C) developing abatement plans for areas around major transportation facilities (including airports, highways, and rail yards) and other ma-

jor stationary sources of noise, and, where appropriate, for the facility or source itself; and,

"(D) evaluating techniques for controlling noise (including institutional arrangements) and demonstrating the best available techniques in such jurisdiction;

"(2) purchase of monitoring and other equipment for loan to State and local noise control programs to meet special needs or assist in the beginning implementation of a noise control program or project;

"(3) development and implementation of a quality assurance program for equipment and monitoring procedures of State and local noise control programs to help communities assure that their data collection activities are accurate;

"(4) conduct of studies and demonstrations to determine the resource and personnel needs of States and local governments required for the establishment and implementation of effective noise abatement and control programs; and

"(5) development of educational and training materials and programs, including national and regional workshops, to support State and local noise abatement and control programs;

except that no actions, plans or programs hereunder shall be inconsistent with existing Federal authority under this Act to regulate sources of noise in interstate commerce;

"(d) develop and implement a national noise environmental assessment program to identify trends in noise exposure and response, ambient levels, and compliance data and to determine otherwise the effectiveness of noise abatement actions through the

collection of physical, social, and human response data;

"(e) establish regional technical assistance centers which use the capabilities of university and private organizations to assist State and local noise control programs;

(f) provide technical assistance to State and local governments to facilitate their development and enforcement of noise control, including direct onsite assistance of agency or other personnel with technical expertise, and preparation of model State or local legislation for noise control; and

"(g) provide for the maximum use in programs assisted under this section of senior citizens and persons eligible for participation in programs under the Older Americans Act."

SEC. 3. [49 U.S.C. 1431.] The fourth sentence of section 611(c)(1) of the Federal Aviation Act, as amended by section 7 of the Noise Control Act of 1972, is amended by striking "a reasonable time" and inserting in lieu thereof "ninety days", and by adding before the period "and a detailed analysis of and response to all documentation or other information submitted by the Environmental Protection Agency with such proposed regulations".

* * * * *

SEC. 5. [42 U.S.C. 4905.] Section 6 of the Noise Control Act of 1972 is amended by adding the following subsection:

"(f) At any time after the promulgation of regulations respecting a product under this section, a State or

political subdivision thereof may petition the Administrator to revise such standard on the grounds that a more stringent standard under subsection (c) of this section is necessary to protect the public health and welfare. The Administration shall publish notice of receipt of such petition in the Federal Register and shall within ninety days of receipt of such petition respond by (1) publication of proposed revised regulations in accordance with subsection (c) (3) of this section, or (2) publication in the Federal Register of a decision not to publish such proposed revised regulations at that time, together with a detailed explanation for such decision."

* * * * *

SEC. 8. (a) The Secretary of Transportation and the Administrator of the Environmental Protection Agency shall jointly study the aircraft noise effects from an airport on communities located in a State other than the State in which the airport is located. The criteria to be used in selecting the airport to be studied shall include:

(1) the airport shall be operated by a State, a unit of general purpose local government of a State, or a special purpose entity constituted for the purpose of operating an airport, and

(2) the airport shall have a point on the airport boundary within one nautical mile from a State boundary, and

(3) the airport shall have had in excess of sixty thousand scheduled air carrier departures during the preceding calendar year.

(b) The study shall be conducted in cooperation with

the airport operator, appropriate Federal, State, and local officials, and the appropriate Metropolitan Planning Organization.

(c) The Secretary and the Administrator shall prepare and submit to Congress a report within nine months of the conclusion of the study, but no later than twenty-four months after enactment of this section.

# APPENDIX J

## APPENDIX J

## PUBLIC LAW 95-504; 92 STAT. 1705 (1978)

## AIRLINE DEREGULATION ACT OF 1978

**[Provisions involved]**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SHORT TITLE

SECTION 1. This Act may be cited as the "Airline Deregulation Act of 1978".

### DEFINITIONS

SEC. 2. (a) Section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301) is amended—

(1) by inserting after paragraph (13) the following new paragraphs:

"(14) 'Charter air carrier' means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in charter air transportation.

"(15) 'Charter air transportation' means charter trips, including inclusive tour charter trips, in air transportation, rendered pursuant to authority conferred under this Act under regulations prescribed by the Board.";

(2) by inserting after paragraph (32) the following new paragraph:

"(33) 'Predatory' means any practice which would constitute a violation of the antitrust laws as set forth in the first section of the Clayton Act (15 U.S.C. 12).";

(3) by inserting after paragraph (35) the following new paragraph:

"(36) 'State agency' means that department, agency, officer, or other entity of a State government which has been designated according to State law as—

"(A) the recipient of any notice required under title IV of this Act to be given to a State agency; or

"(B) the representative of the State in any matter about which the Board is required, under such title IV, to consult with or consider the views of a State agency;" and

(4) by striking out paragraphs (36) and (37).

(b) Section 101 of such Act is amended by renumbering the paragraphs of such section, including all references thereto, as paragraphs (1) through (41), respectively.

## DECLARATION OF POLICY

SEC. 3. (a) Section 102(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1302(a)) is amended to read as follows:

## "FACTORS FOR INTERSTATE AND OVERSEAS AIR TRANSPORTATION

"SEC. 102. (a) In the exercise and performance of its powers and duties under this Act with respect to interstate and overseas air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary

of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 107 of this Act.

"(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

"(3) The availability of a variety of adequate, economic, efficient, and low-price services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, the need to improve relations among, and coordinate transportation by, air carriers, and the need to encourage fair wages and equitable working conditions.

"(4) The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air transportation system, and (B) to encourage efficient and well-managed carriers to earn adequate profits and to attract capital.

"(5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.

"(6) The encouragement of air service at major

urban areas through secondary or satellite airports, where consistent with regional airport plans of regional and local authorities, and then such encouragement is endorsed by appropriate State entities encouraging such service by air carriers whose sole responsibility in any specific market is to provide service exclusively at the secondary or satellite airport, and fostering an environment which reasonably enables such carriers to establish themselves and to develop their secondary or satellite airport services.

"(7) The prevention of unfair, deceptive, predatory, or anti-competitive practices in air transportation, and the avoidance of—

"(A) unreasonable industry concentration, excessive market domination, and monopoly power; and

"(B) other conditions;

that would tend to allow one or more air carriers unreasonably to increase prices, reduce services, or exclude competition in air transportation.

"(8) The maintenance of a comprehensive and convenient system of continuous scheduled airline service for small communities and for isolated areas, with direct Federal assistance where appropriate.

"(9) The encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services.

"(10) The encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation

markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airline industry."

(b) Section 102 of such Act is amended by adding at the end thereof the following new subsection:

"FACTORS FOR FOREIGN AIR TRANSPORTATION

"(c) In the exercise and performance of its powers and duties under this Act with respect to foreign air transportation, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(1) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense.

"(2) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between and coordinate transportation by air carriers.

"(3) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.

"(4) Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign

and domestic commerce of the United States, of the Postal Service, and of the national defense.

"(5) The promotion of safety in air commerce.

"(6) The promotion, encouragement, and development of civil aeronautics."

(c) That portion of the table of contents contained in the first section of such Act which appears under the side heading

"SEC. 102. Declaration of Policy: The Board."

is amended by striking out

"(a) General factors for consideration.
"(b) Factors for all-cargo air service."

and inserting in lieu thereof

"(a) Factors for interstate and overseas air transportation.
"(b) Factors for all-cargo air service.
"(c) Factors for foreign air transportation."

## FEDERAL PREEMPTION

SEC. 4. (a) Title I of the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.) is amended by adding at the end thereof the following new section:

### "FEDERAL PREEMPTION

### "PREEMPTION

"SEC. 105. (a) (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation.

"(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a

certificate issued by the Board under section 401 of this Act, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

"PROPRIETARY POWERS AND RIGHTS

"(b) (1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights.

"(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

"EXISTING STATE AUTHORITY

"(c) When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under title IV of this Act, until modified, sus-

pended, amended, or terminated as provided under such title.

"DEFINITION

"(d) For purposes of this section, the term 'State' means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States.".

(b) That portion of the table of contents contained in the first section of such Act which appears under the center heading

"TITLE I—GENERAL PROVISIONS"

is amended by adding at the end thereof

"Sec. 105. Federal preemption.
"(a) Preemption.
"(b) Proprietary powers and rights.
"(c) Existing State authority.
"(d) Definition.".

* * * * *

# APPENDIX K

# APPENDIX K

## PUBLIC LAW 96–193; 94 Stat. 50 (1980)

## AVIATION SAFETY AND NOISE ABATEMENT ACT OF 1979

**[Provisions Involved.]**

*Be it enacted by the Senate and Houe of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Aviation Safety and Noise Abatement Act of 1979".

### TITLE I

SEC. 101. [49 U.S.C. 2101.] For purposes of this title—

(1) the term "airport" means any air carrier airport whose projects for airport development are eligible for terminal development costs under section 20(b) of the Airport and Airway Development Act of 1970 (49 U.S.C. 1720(b));

(2) the term "airport operator" means any person holding a valid certificate issued pursuant to section 612 of the Federal Aviation Act of 1958 (49 U.S.C. 1432) to operate an airport; and

(3) the term "Secretary" means the Secretary of Transportation.

SEC. 102. [49 U.S.C. 2102.] Not later than the last day of the twelfth month which begins after the date of enactment of this Act, the Secretary, after consultation with the Administrator of the Environmental Protection Agency and such other Federal, State, and interstate agencies as he deems appropriate, shall by regulation—

(1) establish a single system of measuring noise, for which there is a highly reliable relationship

between projected noise exposure and surveyed reactions of people to noise, to be uniformly applied in measuring the noise at airports and the areas surrounding such airports;

(2) establish a single system for determining the exposure of individuals to noise which results from the operations of an airport and which includes, but is not limited to, noise intensity, duration, frequency, and time of occurrence; and

(3) identify land uses which are normally compatible with various exposures of individuals to noise.

SEC. 103. [49 U.S.C. 2103.] (a) (1) After the effective date of the regulations promulgated in accordance with section 102 of this title, any airport operator of an airport may submit to the Secretary a noise exposure map, prepared in consultation with any public agencies and planning agencies in the area surrounding such airport, which sets forth, in accordance with the regulations promulgated pursuant to section 102, the noncompatible uses in each area of the map, as of the date of submission of such map, a description of the projected aircraft operations at such airport during 1985, and the ways, if any, in which such operations will affect such map.

(2) If, after the submission to the Secretary of a noise exposure map under paragraph (1), any change in the operation of an airport would create any substantial new noncompatible use in any area surrounding such airport, the operator of such airport shall submit a revised noise exposure map showing such new noncompatible use.

(b) (1) Section 11 of the Airport and Airway Devel-

opment Act of 1970 (49 U.S.C. 1711) is amended by renumbering paragraphs (6) through (21), and all references thereto, as paragraphs (7) through (22), respectively, and by adding immediately after paragraph (5) the following new paragragh:

"(6) 'Airport noise compatibility planning' means the development for planning purposes of information necessary to prepare and submit (A) the noise exposure map and related information pursuant to section 103 of the Aviation Safety and Noise Abatement Act of 1979, including any cost associated with obtaining such information, or (B) a noise compatibility program for submission pursuant to section 104 of such Act.".

(2) (A) Section 13(a) of the Airport and Airway Development Act of 1970 (49 U.S.C. 1713) is amended by—

(i) inserting "(1)" immediately before the first sentence thereof; and

(ii) adding at the end thereof the following new paragraph:

"(2) In order to promote the development of an effective noise compatability program, for fiscal years beginning after September 30, 1979, the Secretary may make grants of funds for airport noise compatibility planning to sponsors of those air carrier airports whose projects for airport development are eligible for terminal development costs under section 20(b) of this title.".

(B) Section 13(b) of such Act is amended to read as follows:

"(b) AMOUNT AND LIMITATION OF GRANTS.—(1) The award of grants under subsection (a) (1) of this section is subject to the following limitations:

"(A) The total funds obligated for grants under subsection (a)(1) of this section may not exceed $150,000,000, and the amount obligated in any one fiscal year may not exceed $15,000,000.

"(B) The United States share of any airport master planning grant under this section shall be that per centum for which a project for airport development at that airport would be eligible under section 17 of this Act. In the case of any airport system planning grant under this section, the United States share shall be 75 percent.

"(C) No more than 10 percent of the funds made available under subsection (a)(1) of this section in any fiscal year may be allocated for projects within a single State, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or Guam. Grants for projects encompassing an area located in two or more States shall be charged to each State in the proportion which the number of square miles the project encompasses in each State bears to the square miles encompassed by the entire project.

"(2)(A) The total funds obligated for grants under subsection (a)(2) of this section may not exceed $15,000,000.

"(B) The United States share of any airport noise compatibility planning grant under this section shall be that percent for which a project for airport development at that airport would be eligible under section 17 of this Act.".

SEC. 104. [49 U.S.C. 2104.] (a) Any airport operator who has submitted a noise exposure map and the

related information pursuant to section 103(a)(1) may, after consultation with the officials of any public agencies and planning agencies in the area surrounding such airport, the Federal officials having local responsibility for such airport, and any air carriers using such airport, submit a noise compatibility program to the Secretary. Such program shall set forth the measures which such operator has taken or proposes for the reduction of existing noncompatible uses and the prevention of the introduction of additional noncompatible uses within the area covered by the noise exposure map submitted by such operator. Such measures may include, but are not limited to—

(1) the implementation of any preferential runway system;

(2) the implementation of any restriction on the use of such airport by any type or class of aircraft based on the noise characteristics of such aircraft;

(3) the construction of barriers and acoustical shielding, including the soundproofing of public buildings;

(4) the use of flight procedures to control the operation of aircraft to reduce exposure of individuals to noise in the area surrounding the airport; and

(5) acquisition of land and interests therein, including, but not limited to, air rights, easements, and development rights, so as to assure the use of property for purposes which are compatible with airport operations.

(b) The Secretary shall approve or disapprove any program submitted to him pursuant to subsection (a) (other than as such program relates to flight procedures

referred to in subsection (a) (4) of this section) within one hundred and eighty days after it is received by him. The Secretary shall approve such program (other than as such program relates to flight procedures referred to in subsection (a) (4) of this section) (A) if the measures to be undertaken in carrying out such program (i) do not create an undue burden on interstate or foreign commerce, and (ii) are reasonably consistent with obtaining the goal of reducing existing noncompatible uses and preventing the introduction of additional noncompatible uses, and (B) if the program provides for its revision made necessary by any revised noise exposure map submitted under section 103 (a) (2) of this title. Failure of the Secretary to approve or disapprove such program (other than as such program relates to flight procedures referred to in subsection (a) (4) of this section) within such time period shall be deemed to be an approval of such program. With respect to any part of such program which relates to such flight procedures, the Secretary shall provide such part of such program to the Administrator of the Federal Aviation Administration who shall either approve or disapprove such part of such program.

(c) (1) The Secretary is authorized to incur obligations to make grants under this Act from funds made available under subsection (e) of this section for any project to carry out a noise compatibility program or parts thereof not disapproved under subsection (b) of this section. Grants under this Act may be made to operators of airports submitting noise compatibility pro-

grams and to units of local government in the area surrounding such airports if the Secretary determines such units have the capability to carry out projects for which grant applications are made in accordance with such noise compatibility programs. Such airport operator may in turn agree to make the grant available to public agencies in the area surrounding such airports if the Secretary determines such agencies have the capability to carry out projects for which grant applications are made in accordance with such noise compatibility programs. The Federal share of any project for which a grant is made under this subsection shall be 80 percent of the cost of the project. All of the provisions of the Airport and Airway Development Act of 1970 applicable to grants made under that Act (except section 17 of those provisions relating to apportionment) shall be applicable to any grant made under this Act, unless the Secretary determines that any provision of such Act of 1970 is inconsistent with, or unnecessary to carry out, the purposes of this Act.

(2) The Secretary, further, is authorized under this section to make grants to operators of airports and to units of local government referred to in paragraph (1) for any project to carry out a noise compatibility program developed prior to the enactment of this Act or the promulgation of its implementing regulations if the Secretary determines that such prior program is substantially consistent with the purposes of reducing existing uses and preventing the introduction of additional noncompatible uses and that the purposes of this Act

would be furthered by prompt implementation of such program.

(d) The United States shall not be liable for damages resulting from aviation noise by reason of any action taken by the Secretary or the Administrator of the Federal Aviation Administration under this section.

(e) The Secretary shall obligate from funds available for expenditure under section 14(a)(3) of the Airport and Airway Development Act of 1970, not less than $25,000,000, for the fiscal year ending September 30, 1980, for making grants under subsection (c) of this section.

SEC. 105. [49 U.S.C. 2105.] The Secretary, acting through the Administrator of the Federal Aviation Administration, after consultation with the officials of any public agencies or planning agencies in the area surrounding such airport, shall prepare and publish a noise exposure map and a noise compatibility program for the airport established by the Act of June 29, 1940 (54 Stat. 686), and the airport the construction of which was authorized by the Act of September 7, 1950 (64 Stat. 770). Such map and program shall be prepared and published in accordance with the requirements of this Act no later than 1 year after the effective date of the regulations promulgated in accordance with section 102 of this Act.

SEC. 106. [49 U.S.C. 2106.] No part of any noise exposure map or related information described in section 103(a) submitted to, or prepared by, the Secretary and no part of the list of land uses identified by the Secretary as land uses which are normally compatible with various exposures of individuals to noise shall be admitted as

evidence, or used for any other purpose, in any suit or action seeking damages or other relief for the noise that results from the operation of an airport.

SEC. 107. [49 U.S.C. 2107.] (a) No person who acquires property or an interest therein after the date of enactment of this Act in an area surrounding an airport with respect to which a noise exposure map has been submitted under section 103 of this title shall be entitled to recover damages with respect to the noise attributable to such airport if such person had actual or constructive knowledge of the existence of such noise exposure map unless, in addition to any other elements for recovery of damages, such person can show that—

(1) a significant change in the type or frequency of aircraft operations at the airport; or

(2) a significant change in the airport layout; or

(3) a significant change in the flight patterns; or

(4) a significant increase in nighttime operations;

occurred after the date of the acquisition of such property or interest therein and that the damages for which recovery is sought have resulted from any such change or increase.

(b) For purposes of this section, constructive knowledge shall be imputed, at a minimum, to any person who acquires property or an interest therein in an area surrounding an airport after the date of enactment of this Act if—

(1) prior to the date of such acquisition, notice of the existence of a noise exposure map for such area was published at least three times in a newspaper of

general circulation in the county in which such property is located; or

(2) a copy of such noise exposure map is furnished to such person at the time of such acquisition.

SEC. 108. [49 U.S.C. 2108.] The Secretary shall study (1) airport noise compatibility planning carried out with grants made under section 13 of the Airport and Airway Development Act of 1970, and (2) airport noise compatibility programs carried out with grants made under this title, to determine to what extent such planning and programs are achieving the goals of reducing existing noncompatible uses of land around airports and preventing the introduction of new noncompatible uses around airports. Not later than January 1, 1981, the Secretary shall submit a report to Congress setting forth the determinations made pursuant to such studies together with legislative recommendations, if any, which the Secretary determines necessary.

* * * * *

# Opposition

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No. 81-1101

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

*Petitioners,*

vs.

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Can a state agency, not the owner or operator of an airport, exercise its police power to compel an airport proprietor to enforce a curfew on regularly scheduled airline flights without violating the Supremacy Clause of the Constitution?

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Certain of the respondents on behalf of whom this brief is filed are corporations. They are identified in the Form of Appearance, filed January 4, 1982, on behalf of Air Transport Association of America and others. The following additional information regarding those respondents is provided pursuant to Rule 28.1 of this Court: The parent of Pacific Southwest Airlines is PSA, Inc.; the parent of United Air Lines, Inc. is UAL, Inc.

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No. 81-1101

IN THE

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OCTOBER TERM, 1981

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

*Petitioners,*

*vs.*

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents San Diego Unified Port District, Air Transport Association of America and the airline respondents respectfully request that the Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 651 F.2d 1306.

## STATEMENT OF THE CASE

This case presents without change the issue settled in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Holding that Congress had vested in federal agencies "full control over aircraft noise, pre-empting state and local control," the Court nullified a curfew ordinance directed by the City of

Burbank against the airport proprietor Lockheed. *Id.* at 633. In this case the petitioner California Department of Transportation ("CalTrans") issued an administrative order requiring respondent San Diego Unified Port District, the owner and operator of San Diego Lindbergh Field,[1] to enforce a curfew on regularly scheduled airline flights. The lower courts unanimously found the result foreordained by the *Burbank* Court's conclusion: "We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it." *Id.* at 640. Congress has made no change, and this case presents no issue justifying the attention of this Court.

Both petitioner and the respondent Port District are creatures of the California legislature. The airport and the land on which it is located were conveyed to the Port District in 1962. San Diego Unified Port District Act, 1962 Cal. Stats., ch. 67, 1st Ex. Sess., *codified in* CAL. HARB. & NAV. CODE, App. 1 (West 1978 & Supp. 1981). The Act granted the Port District power to operate and promote the airport, *id.* § 4, govern its affairs by ordinance or resolution, *id.* § 21, hold and dispose of real property and make contracts, *id.* §§ 25 & 35, acquire all property and facilities incident to the promotion of commerce, *id.* §§ 30 & 57, sue and be sued, *id.* § 23, and take all action necessary to exercise its powers, *id.* § 35. In 1975 the Port District by resolution prohibited aircraft takeoffs and restricted landings to certain aircraft at Lindbergh Field between 12:00 midnight and 6:00 a.m.[2]

California statutes provide for the issuance of airport permits by the petitioner Department and make unlawful the operation of an airport by "any political subdivision . . . or any person" without such a permit. CAL. PUB. UTIL. CODE §§ 21662 & 21663 (West Supp. 1981). The Department is authorized to "adopt

[1] Lindbergh Field is the principal airport serving the 1.6 million residents of the San Diego metropolitan area.

[2] The validity of the Port District's curfew resolution is not at issue in this litigation.

noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit," *id.* § 21669, but is prohibited from acquiring an airport owned or controlled by a political subdivision of the State without that entity's consent. *Id.* § 21632. Regulations issued by the Department establish a maximum permissible noise level for airports such as Lindbergh Field. 21 CAL. ADMIN. CODE § 5012(c), Appendix to Petition, at G 10-11 (hereinafter "App."). These regulations prohibit the holder of an airport permit from operating without a variance from the Department if any land in residential use is within the specified noise contours. *Id.* §§ 5062, 5014 & 5006, App. G 27, 11 & 5. The district court found that, with the airport's location and current aircraft technology, "it is physically impossible for Lindbergh Field to comply" with petitioner's regulation. 457 F. Supp. at 292, App. C 18. To comply with state law and avoid criminal penalties, the Port District "ha[d] no choice but to seek a noise variance," which it did. *Id.*, App. C 19.

On January 17, 1978 the petitioner Department issued a variance order that required respondent Port District to expand its existing curfew to the hours of 11:00 p.m. to 7:00 a.m. App. E 21. This requirement, set forth as Condition 4 of petitioner's order, is the subject of this action for declaratory relief and injunction. Based upon this Court's ruling in *City of Burbank v. Lockheed Air Terminal, Inc., supra,* the district court granted a preliminary injunction against enforcement of Condition 4, 457 F. Supp. at 295, App. C 27, and the Court of Appeals affirmed in a unanimous opinion. 651 F.2d 1306, App. A. No circuit judge requested a hearing en banc. App. B 2. In addition, both lower courts concluded that the California legislature did not authorize the petitioner Department to control the manner in which the Port District exercises its statutory powers over airport operations. 457 F. Supp. 295, App. C 23; 651 F.2d at 1319, App. A 27.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### I. CALIFORNIA STATUTES RESTRICT PETITIONERS' POWERS OVER RESPONDENT PORT DISTRICT AND PRECLUDE PETITIONERS FROM PRESENTING ANY BUT A THEORETICAL ISSUE REGARDING A STATE'S INHERENT SOVEREIGNTY OVER ITS POLITICAL SUBDIVISIONS.

Petitioners argue that *Burbank's* broad rule of preemption does not apply to airport proprietors and that a state has the inherent right to require its political subdivisions to exercise their unpreempted powers to curfew airports. This Court should decline certiorari because, whatever may be the theoretical reach of a state's inherent sovereignty over its political subdivisions, the California legislative scheme denies the full range of those powers to the petitioner Department.

Each of the lower courts carefully reviewed the California statutes creating the respondent Port District and defining the powers of the petititoner Department in the field of aeronautics. The district judge held that the legislature had "carefully drafted a statutory scheme which confers on the Port District exclusive powers of ownership and control of Lindbergh Field" and which denies to the petitioner Department the power to control the manner in which the Port District regulates airport operations. 457 F. Supp. at 293-94, App. C 23. The Court of Appeals agreed and ruled that the power the Department had attempted to exercise was forbidden to it by the State's "own political system." 651 F.2d at 1319, App. A 27. The resolution of this state-law question by the district and circuit judges in this case is not appropriate for review by this Court. *See Butner v. United States,* 440 U.S. 48, 58 (1979). Thus petitioners' contention—that *Burbank's* holding was extended by the court below to usurp the State's authority over its political subdivisions—is without support under California law. The decision below is entirely harmonious with the delegation of authority fashioned in this instance by the California legislature.

The inherent sovereignty issue that petitioners would have this Court resolve is an abstraction not presented on this record. The California legislative scheme absolutely prevents the development of that issue in this case.

## II. THIS CASE WAS CORRECTLY DECIDED BELOW AND DOES NOT PRESENT THE ISSUE REGARDING PREEMPTION OF AN AIRPORT PROPRIETOR'S AUTHORITY THAT WAS UNRESOLVED IN CITY OF BURBANK.

The ordinance before this Court in *Burbank* made it unlawful for the owner and operator of Hollywood-Burbank Airport to allow a jet aircraft to take off between 11:00 p.m. and 7:00 a.m. 411 U.S at 625-26. The Court reviewed the relevant provisions of the Federal Aviation Act of 1958 and the specific noise abatement measures in its 1968 and 1972 amendments and held: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." *Id.* at 633. The Court noted that in the 1968 and 1972 amendments Congress expressed its intention not to change the existing apportionment of powers between the federal government and state and local governments. *Id.* at 634-35. The Court's opinion quoted from the Senate Report accompanying the 1968 amendment. That report concurred in the written opinion of the Secretary of Transportation that the amendment

> "would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968), *quoted in* 411 U.S. at 635.

Based on other statements in the legislative history the Court noted it was not deciding "what limits, if any, apply to a municipality as [an airport] proprietor" inasmuch as "authority that a municipality may have as a landlord is not necessarily congruent with its police powers." 411 U.S. at 636 n.14.

The petitioner Department argues from post-*Burbank* cases decided by lower courts that airport proprietors are free to impose airport use restrictions, including curfews. The Department concedes it is not the proprietor of Lindbergh Field (Pet. 12) but asserts that the State of California has inherent power to direct the manner in which political subdivisions exercise their unpreempted authority. The Ninth Circuit correctly rejected this attempt by the petitioner to circumvent the holding in *Burbank*.

The Court of Appeals noted the *Burbank* Court's recognition that airport proprietors might, as landlords, have "special, although undefined, leeway" to deal with aircraft noise (651 F.2d at 1316, App. A 20), and gave the rationale for this exception:

> "Since airport proprietors bear monetary liability for excessive aircraft noise under *Griggs v. Allegheny County*, 369 U.S. 84 (1962), fairness dictates they must also have the power to insulate themselves from that liability. But before an entity may possess this power, it must bear the responsibility, either actual or potential, for excessive aircraft noise.
>
> ". . .
>
> "Among the bases given in *Griggs* for constitutional liability, or proprietorship for *City of Burbank* purposes, were the county's ability to obtain the necessary approach easements, and its status as promoter, lessor, and operator of the airport.
>
> *"These criteria . . . comprise a federal definition of proprietors for preemption purposes. To the extent that state law provides these qualities, we inquire into the Port District's status under state law."* *Id.* at 1316-17, App. A 21-22 (footnotes & citation omitted; emphasis added).

The Ninth Circuit carefully evaluated "California's extensive grant of powers to the Port District" and concluded that the District bore every earmark of proprietorship. *Id.* at 1318, App. A 24. The court held that *"City of Burbank*'s proprietor exception looks to who will pay for the taking of air easements"

and that the State legislature had unequivocally placed this liability upon the Port District and the residents of its five constituent cities.[3] *Id.* at 1319, App. A 26. The petitioner Department, said the court, "bears no liability for excessive aircraft noise at Lindbergh Field, it is not now a proprietor under federal law, and cannot avail itself of *City of Burbank*'s footnote 14." *Id.* (footnote omitted).

The Circuit held that here, as in *City of Burbank,* a governmental entity was attempting through the use of its police power to impose a "mandatory curfew on an unwilling airport proprietor." *Id.* at 1312, App. A 11. Petitioner's action is barred by the *Burbank* decision. Moreover, any authority Congress left to airport proprietors clearly rests on the proprietor's status as "landlord." 411 U.S. at 636 n.14. This property right was vested by the California legislature in the Port District, not in the Department of Transportation. By attempting to exert its non-proprietor police power the petitioner agency has not brought itself within the landlord exception contemplated in the *Burbank* footnote. Thus the issue unresolved in that case regarding the extent of a proprietor's authority as landlord is not presented by this case.[4]

Petitioners also contend that the Ninth Circuit's decision is at odds with the decision of a district court in the same Circuit, *Air Transport Association of America v. Crotti,* 389 F. Supp. 58 (N.D. Cal. 1975) (3-judge court). The Ninth Circuit considered that argument but found its opinion to be consistent with that of the district court. 651 F.2d at 1315-16, App. A 17-19. In any event, resolution of a conflict within a Circuit, if any exists, is a matter resting with the Court of Appeals. *See* Harlan, *Manning the Dikes,* 13 R.N.Y. City B.A. 541, 552 (1958); *United States v.*

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[3] The governing board of the Port District is comprised of commissioners selected by the five San Diego area cities. Cal. Harb. & Nav. Code, App. 1, § 16 (West 1978).

[4] Although the airline respondents and the Port District may differ as to the extent of any unpreempted authority held by an airport proprietor, all respondents agree that no such authority is possessed by the petitioner Department.

*Crosson,* 462 F.2d 96, 102 (9th Cir.), *cert. denied,* 409 U.S. 1064 (1972) (precedential weight of 3-judge district court decision is same as any district court); *accord, Lewis v. Rockefeller,* 431 F.2d 368, 371 (2d Cir. 1970).

## III. THE DECISION BELOW DOES NOT CONFLICT WITH RECENT CONGRESSIONAL ACTION.

The court below examined the post-*Burbank* federal legislation cited by petitioners and concluded that "Congress ha[d] not changed its collective mind regarding the wisdom of forbidding local regulation of the sources of aircraft noise." 651 F.2d at 1312-14 & n.15, App. A 11-14. The court held that stare decisis required affirmance. *Id.* at 1312, App. A 11. That rule applies with particular force when Congress can overrule this Court's construction of federal statutes by legislation. *Runyon v. McCrary,* 427 U.S. 160, 175 (1976); *see Edelman v. Jordan,* 415 U.S. 651, 671 n.14 (1974). That is precisely the situation where the Court gives preemptive effect to federal legislation under the Supremacy Clause. *Cf. Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 272 n.6 (1977). Since 1973, Congress has had three clear opportunities to modify *Burbank* if it so desired. In each instance Congress left unaltered the relationship between the federal government and state and local governments as enunciated in that case.

### A. The Quiet Communities Act of 1978

The first opportunity to upset *Burbank* came when Congress passed the Quiet Communities Act of 1978, which among other things amended the principal noise abatement provision of the Federal Aviation Act, Section 611. Pub. L. No. 95-609, § 3, 92 Stat. 3080 [codified in scattered sections of 42 & 49 U.S.C. (Supp. III 1979)], App. I 4. The 1978 Act provided for a nationwide quiet communities program administered by local governments and funded by the federal treasury. Petitioners contend the establishment of this grant program weighs against the *Burbank* holding. Pet. 23-27.

Two factors combine to refute petitioners' argument. In formulating the Quiet Communities Act of 1978, Congress

inserted a requirement that "no actions, plans or programs hereunder shall be inconsistent with existing Federal authority under [the Noise Control Act of 1972] to regulate sources of noise in interstate commerce." 42 U.S.C. § 4913(c) (Supp. III 1979), App. I 3. This is critical because this Court had explicitly held in *Burbank* that the 1972 Act "reaffirm[ed] and reinforce[d] the conclusion that [federal agencies] ha[ve] full control over aircraft noise, pre-empting state and local control" and vested such "pervasive control" in federal agencies that it left "no room for local curfews or other local controls." 411 U.S. at 633 & 638. Together these points lead to the conclusion that the Quiet Communities Act leaves *Burbank* undisturbed. For when this Court defines federal authority under a statute and Congress later confirms "existing Federal authority" under that same statute, the only sensible conclusion is that Congress chose to continue the status quo as interpreted by this Court's decision.

### B. The Airline Deregulation Act of 1978

The second opportunity to overturn *Burbank* came when Congress passed the Airline Deregulation Act of 1978. PUB. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.), App. J. Section 4 of the Act — which added Section 105(a)(1) to the Federal Aviation Act of 1958 — expressly preempted any state regulation "relating to rates, routes, or *services* of any air carrier ...." 49 U.S.C. § 1305(a)(1) (Supp. III 1979), App. J 6 (emphasis added). As recognized by the court below, the focus of the Airline Deregulation Act was on economic objectives and not on noise control. 451 F.2d at 1313 n.15, App. A 14. But airport curfews plainly "relate" to air carrier "services" since they prohibit those services during certain hours. Indeed, as the CalTrans curfew order applies only to air carrier services, and not to other operations, that is its only effect. App. E 21.

The Airline Deregulation Act also added Section 105(b)(1), which states: "[n]othing in [Section 105(a)] ... shall be construed to limit the authority of any State or political subdivision thereof ... *as the owner or operator* of an airport served by any air carrier certificated by the [Civil Aeronautics] Board to exercise its proprietary powers and rights." 49 U.S.C.

§ 1305(b)(1) (Supp.III 1979), App. J 7 (emphasis added). The sole legislative explanation of Section 105(b)(1) indicates that airport owners remain subject to existing "constitutional and statutory limitations." 124 CONG. REC. 37419-20 (1978) (remarks of Sen. Cannon). Shortly after the Act's passage, the Civil Aeronautics Board interpreted Section 105(b)(1) as maintaining "the *status quo* with respect to the rights and powers of local governments to take certain actions in their capacity as airport owners and proprietors under case law." 44 FED. REG. 9951 (Feb. 15, 1979). The Board noted that, although the full scope of those rights and powers has yet to be developed, "it is clear that *the airport proprietor must be acting on its own, not under legislative compulsion* ...." *Id.* (emphasis added).

Petitioners suggest that Section 105(b)(1) somehow undermines *Burbank*. Pet. 27-28. But quite the opposite is true. This Court drew a distinction between actions taken by airport owners acting as proprietors and invalid attempts by states and political subdivisions to use their police power to regulate airport owners in fields preempted by the federal government. 411 U.S. at 635-36 n.14. Section 105(b)(1) reaffirms that distinction and preserves only the authority that a state or political subdivision has "as the owner or operator" of an airport. CalTrans is neither.

### C. The Aviation Safety and Noise Abatement Act of 1979

The third chance to change the *Burbank* decision came when Congress passed the Aviation Safety and Noise Abatement Act of 1979. PUB. L. No. 96-193, 94 Stat. 50 (1980) (to be codified in scattered sections of 49 U.S.C.), App. K. Title I of the Act provided for the establishment of a national aviation noise measurement system, the encouragement of airport noise compatibility planning and programs through grants administered by the Secretary of Transportation, and the creation of procedures under which airport proprietors can secure federal immunity from aircraft noise liability suits. *Id.* §§ 102-104, 107, App. K 1-10.

Once again Congress chose not to alter this Court's decision. The relevant Senate Report states: "nothing in the bill is

intended to alter the respective legal responsibilities of the Federal Government and local airport proprietors for the control of aviation noise." S. REP. No. 96-52, 96th Cong., 1st Sess. 13 (1979).[5] The relevant House Report contains a similar statement. H.R. REP. No. 96-203 (Part 1), 96th Cong., 1st Sess. 4 (1979)[6].

In short, Congress has shown no inclination since 1973 to allow states and political subdivisions more room for engaging in airspace management at the expense of federal regulatory powers.

## IV. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

Petitioners claim (Pet. 12-19) that the Ninth Circuit's decision conflicts with a series of decisions by this Court relating to the powers of states vis-à-vis their political subdivisions. In fact this Court's cited cases involved questions fundamentally different from that decided by the Ninth Circuit.

Three cases stand for the proposition that the Contract Clause and the Due Process Clause of the Fourteenth Amendment do not prohibit a state from altering or abolishing the contract and property rights of a political subdivision when the subdivision holds the rights or property for governmental purposes. *Trenton v. New Jersey,* 262 U.S. 182 (1923), held that the New Jersey legislature could impose a license fee on Trenton's diversion of water even though the legislature arguably had granted the city's predecessor in interest a right to divert water without charge. *Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907), held that the Pennsylvania legislature could provide a mechanism for

[5] The Senate Report concerned S. 413. The Senate substituted the language of S. 413 in passing H.R. 2440. 125 CONG. REC. S 14910 (daily ed. Oct. 22, 1979). The Conference Committee accepted the Senate version of Title I with only minor changes. H.R. REP. No. 96-715, 96th Cong., 1st Sess. 15-19 (1979).

[6] The House Report concerned H.R. 3942 which was comparable to S. 413.

uniting cities with each other even though such a union might alter the individual cities' charters and laws vesting them with governmental powers and property rights. And *Atkin v. Kansas*, 191 U.S. 207 (1903), held that the Kansas legislature could restrict the contracting powers of its political subdivisions by requiring them to follow an eight-hour law in contracts with private parties.

Those cases are irrelevant. The Ninth Circuit did not rule that the Constitution or federal statutes prevent California from lodging ownership and control of Lindbergh Field in any state agency or political subdivision of its choice. The State is free under the Circuit Court's opinion to alter its legislative scheme and replace the Port District as the airport proprietor with some other agency such as CalTrans. But it has not done so. *Compare, e.g.*, CAL. PUB. UTIL. CODE § 21632 *with* San Diego Unified Port District Act sections cited p. 2 *supra*.

The balance of petitioners' citations are equally inapposite. The statement in *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), to the effect that political subdivisions have never been considered as sovereign entities has no application here. The Ninth Circuit did not treat the Port District as a separate sovereign with a right to prevent CalTrans from assuming control over the airport's affairs if the State legislature so directs. And we note that petitioners conclude their discussion of *National League of Cities v. Usery*, 426 U.S. 833 (1976), with the concession that the case is "not relevant." Pet. 19.

The contention (Pet. 20-23) that the Circuit's preemption analysis conflicts with various of this Court's preemption decisions is also without merit. The Ninth Circuit's preemption analysis was not an original work; it was provided by this Court in *Burbank*. And the suggestion (Pet. 22) that the *Burbank* opinion turned on the private ownership of the airport being regulated is unfounded as well. The opinion expressly recognized that state police power regulation was preempted regardless of the private or public character of airport ownership involved. 411 U.S. at 636 n.14.

In sum, the petition fails to demonstrate that the Ninth Circuit decided a federal question in a way in conflict with applicable decisions of this Court.

## CONCLUSION

For the foregoing reasons the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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# Petitioner's Reply Brief

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*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

# PETITIONERS' REPLY BRIEF

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# PETITIONERS' REPLY BRIEF

Pursuant to Rule 22.5, petitioners respectfully submit this reply brief.

## ARGUMENT

### 1. This Case Presents a Very Real Issue As to Whether a State Has the Inherent Authority to Regulate the Otherwise Unpreempted Activities of Its Political Subdivisions.

Respondents commence with the rather startling argument that the Court of Appeals actually decided this case on the basis of California law—leaving at best "but a theoretical issue regarding a state's inherent sovereignty over its political subdivisions." (Resp. Br., p. 4.)

Respondents thus urge the rule that deference should be given to lower court rulings on state law questions. Such arguments have little, if anything, to do with the issues in this case.

The Court of Appeals' conclusion was that the authority of the California Department of Transportation, under California law, *when considered in light of federal law,* leads to a conclusion that the department is preempted from acting. The court's finding was that the department is not a "proprietor" within what the court found to be "a federal definition of proprietors for preemption purposes." (651 F.2d at 1317; Appendix to Petition (hereafter "app.") A-22.)

Such an issue "is and must be a matter of federal law." (*Cf., Community Communications Company, Inc.* v. *City of Boulder* (No. 80-1350, Jan. 13, 1982) ____ U.S. ____, 50 U.S.L.W. 4144, 4147, n. 15.) It is an issue of federal preemption which necessarily involves consideration of whether Congress has ever articulated such a definition or, for that matter, has ever expressed an intent to preempt state authority over those political agencies which fit such a definition. It is, moreover, an issue of federal preemption which necessarily involves the inherent right of a state to control its political subdivisions operating airports.

Respondents' arguments obviously beg the issue. A conclusion that the California Legislature has designated the San Diego Unified Port District as the airport proprietor does not mean (at least not as a matter of *state law*) that the California Legislature cannot *also*

provide for checks and balances on the exercise of the airport proprietor's authority, using the agency of other state instrumentalities, should it choose to do so.[1]

Respondents have never once suggested that, absent federal preemption, the California Department of Transportation would not be authorized, under provisions of California law, to condition a variance by requiring a curfew. Neither did the Court of Appeals. In fact, respondents' brief in opposition acknowledges the efficacy of these provisions. (Resp. Br., p. 3.) Indeed, the validity of these provisions is at the very heart of respondents' insistence that an injunction, issued by the federal courts, is required to prevent their enforcement. (See app. D.)

Respondents' reliance on California Public Utilities Code section 21632 perhaps best puts the entire "state law" issue in perspective. By this section, the California Legislature has prohibited the California Department of Transportation from acquiring any airport owned by a political subdivision without its consent. But this section

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[1] Despite the Court of Appeals' analysis, the State of California did not below, nor does it now, rely on a claim that its Department of Transportation is a "proprietor" of the airport. It instead relies on authority granted to the department under provisions of the State Aeronautics Act. This includes authority to exercise the state's "functions relative to aeronautics" (Cal. Pub. Util. Code § 21002(d), which in turn includes "[a]ssuring that persons residing in the vicinity of airports are protected to the greatest possible extent against intrusions by unreasonable levels of aircraft noise." (Cal. Pub. Util. Code § 21002(g).) It also includes those enabling provisions of California law which authorize and provide for the department's noise variance procedures. (Cal. Pub. Util. Code § 21669, et seq. (app. F); title 21, Cal. Admin. Code, § 5000, et seq. (app. G).)

only becomes relevant if one assumes that the California Legislature has also been disabled, by act of Congress, from authorizing the California Department of Transportation to exercise control, through its noise variance processes, over the Port District's ownership. Two questions are presented—one of ownership, the other of control. The first does not answer the second.

In short, the real thrust of respondents' position, accepted by the Court of Appeals, is that, unless the California Department of Transportation is designated as the owner and operator of the airport, the California Legislature is preempted by federal law from authorizing the department to regulate the manner in which the Port District exercises its otherwise *unpreempted* activities. Indeed, the issue stated by the Court of Appeals at the outset was phrased in terms of "whether the doctrine of federal preemption prevents the State of California from directing a political subdivision to impose a curfew on aircraft flights. . . ." (651 F.2d at 1308; app. A-1, 2.) The Court of Appeals countered California's argument that a state has inherent power over its political subdivisions by simply concluding:

> "The observation that a state has a power in no way implies any doubt about equally well-settled limits to that power, such as federal preemption. . . ." (651 F.2d at 1316; app. A-19.)

In holding that federal law can render states powerless to regulate their political subdivisions, it is respectfully submitted that the Ninth Circuit has introduced a new and erroneous concept of the principle of federal-

ism which should be reviewed by this Court.

**2. Respondents' Argument That This Case Presents No Issue Unresolved in the Burbank Case is Without Merit.**

Respondents' reliance on *City of Burbank* v. *Lockheed Air Terminal Inc.* (1973) 411 U.S. 624, continues to be faulty and misplaced. That case had nothing to do with an attempt by *a state* to exercise authority over *a political subdivision.* It, instead, dealt with the efforts of *a political subdivision* to exercise authority over *a private corporation.* This Court, in *Burbank,* did not in any way suggest that state authority over political subdivisions has or can be usurped by federal law.

Respondents' arguments are additionally refuted by the rationale of this Court's recent decision in *Community Communications Company, Inc.* v. *City of Boulder, supra,* ___ U.S. ___, 50 U.S.L.W. 4144. That decision reaffirms that our Nation has a *dual* system of government, involving but two sovereigns (federal and state), in which political subdivisions, by their very nature, are subordinate to the authority of the sovereign states they represent.[2]

It is thus clear that concepts of state sovereignty, long embraced by this Court, do not recognize the existence of local agencies of state government with authority greater than that of the state itself.[3] It is one thing to say

[2] *Community Communications* also reaffirms the State's views herein concerning the proper standards for construing congressional intent. Quoting *Parker* v. *Brown* (1943) 317 U.S. 341, 350–351, this Court observed that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (50 U.S.L.W. at 4146.) The same quote is found in the dissent. (50 U.S.L.W. at 4150.)

[3] Can "the pieces of the pie be larger than the pie. . ."? (See *Community Communications Company, Inc.* v. *City of Boulder* (10th Cir. 1980) 630 F.2d 704, 717, dissenting opinion.)

that a state may not operate in an area occupied by the federal government; it is quite another thing to say that a state can be divested of its authority over its instrumentalities of government. Such action strikes at the very heart of a state's sovereignty.

**3. Recent Congressional Action Does Not Uphold the Application of Burbank's Premise to the Facts of This Case.**

Respondents argue that the recent Acts of Congress must be interpreted in light of *Burbank* and that they thus reflect a congressional desire to "continue the status quo as interpreted" by *Burbank*. (Resp. Br., pp. 8–9.)

The first fallacy with respondents' premise is that *Burbank* alone did not represent the "status quo" as of the time of these enactments. These Acts must also be read in light of many subsequent events, including the retreat, by the principal federal agencies involved, from the broadly worded language of preemption in *Burbank* upon which respondents rely.[4]

The congressional Acts must also be read in light of subsequent judicial acknowledgment of the proprietary authority vested in municipal operators and of the right of state control over it. It cannot be assumed that Con-

[4] Compare Justice Douglas' findings in *Burbank* of "a uniform and exclusive system of federal regulation" leaving "no room for local curfews or other local controls" (411 U.S. at 638 and 639) with the subsequent pronouncements of the principal federal agencies:

"... We have been urged to undertake—and have considered carefully and rejected—full and complete federal preemption of the field of aviation noise abatement...." (Dept. of Transportation, Fed. Aviation Administration, *Aviation Noise Abatement Policy,* Nov. 18, 1976, p. 34.)

"... The primary obligation to address the airport noise problem always has been and remains a local responsibility...." (*Id.* at p. 2.)

gress was oblivious to the interpretation of *Burbank* provided in *Air Transport Association of America* v. *Crotti* (N.D. Cal. 1975) 389 F.Supp. 58, where the right of the public airport proprietor to control airport use was found to be "firmly established . . . whether it be directed by state police power or his own initiative. . . ." (*Id.* at 63–64.) Neither can it be assumed that Congress was unaware of the following view expressed in the federal government's 1976 noise policy:

> "The *Crotti* case upheld in part a California airport noise statute imposing noise abatement duties on airport proprietors *and established the principle that a state statute could reach proprietors that are governmental agencies and hence arms of the state.* The Burbank preemption rule thus has not extended to proprietors, except with respect to regulations that actually affect the flight of aircraft. . . ." (*Aviation Noise Abatement Policy, supra,* p. 33; emphasis added.)[5]

The second fallacy with respondents' premise is that Congress has actually expressed a different approach. This is demonstrated by the amendments to the Noise Control Act of 1972 (Pub. Law 92-574, 86 Stat. 1234 (1972); app. H) made by the Quiet Communities Act of 1978 (Pub. Law 95-609, 92 Stat. 3079 (1978); app. I). Respondents urge that the qualification that "no actions, plans or programs hereunder shall be *inconsistent* with

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[5] As argued in the petition (pp. 20–23), it must be assumed that Congress was aware of the established structure of state government and would have articulated any attempt to divest the states of their historic powers over political subdivisions.

existing Federal authority under [the Noise Control Act of 1972] to regulate sources of noise in interstate commerce" (emphasis added), reaffirms a conclusion that federal agencies have full control over aircraft noise, preempting state and local control. (Resp. Br., p. 9.) Congress, however, must be assumed to know the difference between premption based upon exclusive federal occupation of a field and preemption based on inconsistency between the enactments of the federal government and those of a state or local government. Congress spoke in terms of the latter. Congress also stated at the outset of the Act that one of its purposes was "[t]o promote the development of effective State and local noise control programs. . . ." (Quiet Communities Act of 1978, *supra,* 42 U.S.C. § 4913; app. I-1.)

Finally, respondents point to the Airline Deregulation Act of 1978 (Pub. Law 95-504, 92 Stat. 1705 (1978); app. J), and urge that the preemption of state regulation relating to rates, routes, or *services* of any air carrier applies to *airport curfews.* (Resp. Br., p. 9.) There is no basis, however, for reading this kind of an intent into the language used. The Airline Deregulation Act was passed to alter the authority of the Civil Aeronautics Board (CAB), and ultimately to abolish the functions of that agency. (See 49 U.S.C. § 1551.) Aware that state regulatory agencies sometimes overlapped regulation by the CAB, the purpose of Congress was to eliminate such state regulation as well. In short, the section cited by respondents was meant to prevent state agencies from telling carriers what routes to fly, what fares to charge,

and what services as may be provided passengers, just as the CAB was to be prevented from such regulation.[6] The legislative history reflects no purpose in prohibiting curfews or disrupting the normal authority that a state exercises over its political subdivisions. Had this been the purpose of Congress, such intent would have been expressed.[7]

## CONCLUSION

The underlying issue in this case relates to control over the *use* of *public* property, and the right of the State of California to provide mechanisms for determining how such property may be used.

To the extent that Congress has not preempted local agencies operating airports from imposing restrictions on airport use, it has left them free to act as it found them, i.e., as political subdivisions of state government, established to administer public resources of the state of which they are a part, and subject to the underlying

[6] The Court of Appeals acknowledged that the Airline Deregulation Act was "not directly applicable because of its economic objectives. . . ." (651 Fed.2d at 1313, n. 15; app. A-14.)

[7] It may be noted that respondents' interpretation would have vast impacts in other areas of state authority. For example, an airport may not construct a new runway or expand an existing runway without securing an amended state airport permit. (Cal. Pub. Util. Code § 21664.5.) Yet, under respondents' definition, such a decision could well have an impact on "services." The same would be true of the revocation or suspension of a permit. (Cal. Pub. Util. Code §§ 21668 and 21668.2.) Similarly, the application of the California Environmental Quality Act (Cal. Pub. Resources Code § 21000 et seq.) to the construction of airport facilities would also be undermined, for the availability of such facilities also can be said to affect "services." Fortunately, none of these results can be supported by the words of the federal statute nor any part of its legislative history.

authority of the state which they represent.

For the reasons stated in the petition, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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# Amicus Brief

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## BRIEF OF AMICUS CURIAE STATE OF ILLINOIS IN SUPPORT OF ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The State of Illinois, by Tyrone C. Fahner, Attorney General, respectfully submits this brief, pursuant to Supreme Court Rule 36.1, as *Amicus Curiae* on behalf of the Petitioners herein and in support of the issuance of a writ of certiorari.

## INTEREST OF AMICUS CURIAE

The interest of the State of Illinois in this proceeding stems from its power and duty to protect its citizens from excessive airport noise emissions, exposure to which endanger the public health and welfare, and from its inherent power to regulate its political subdivisions to ensure that they function in a manner best suited to the public interest.

Illinois is certainly no stranger to the airport noise problem. There are over 70 publicly-owned airports within the State of Illinois. At present, a good many of those airports present situations wherein significant numbers of people living and working nearby are regularly subjected to aircraft noise at levels greatly disruptive of normal life and possibly quite injurious to health. Indeed, O'Hare International Airport, still reputed to be the world's busiest, operates in perhaps the most heavily noise-impacted environs in the country, both in terms of numbers of people affected and severity of impact. Equally important is the fact that most if not all of the remaining publicly-owned Illinois airports have substantial potential for "growing into" an airport noise problem, as those in the former category have done, if the creature is allowed to evolve uncontrolled. Both situations underscore the pressing need for aggressive and comprehensive regulatory programs.

The State of Illinois has the power and duty to protect its citizens, including those who live near publicly-owned airports, from environmental conditions which adversely affect the public health, safety and welfare, and generally to ensure a clean and healthful environment within the boundaries of the State. Illinois Constitution, Article XI, Secs. 1 and 2 (1970). Seizing upon this mandate, the General Assembly of the State of Illinois enacted in 1970 the Illinois Environmental Protection Act, Illinois Revised Statutes, 1979, ch. 111½, par. 1001 *et seq.* (hereinafter the "Act"), which established a comprehensive program to prevent environmental degradation. One of the environmental problems which the Act specifically sought to remedy is excessive noise, the emission of which the General Assembly found:

> . . . endangers physical and emotional health and well-being, interferes with legitimate business and recreational activities, increases construction costs, depresses property values, offends the senses, creates public nuisances, and in other respects reduces the quality of our environment. Ill. Rev. Stat., 1979, ch. 111½, § 1023.

In acting to remedy existing and potential noise pollution problems in Illinois, the General Assembly prescribed the following broad regulatory limitations:

> No person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business or activity, so as to violate any regulation or standard adopted by the (Illinois Pollution Control) Board under this Act. Ill. Rev. Stat., 1979, ch. 111½, par. 1024.

In addition, the Illinois Pollution Control Board, having general rule-making authority under the Act to adopt regulations defining, determining, and implementing standards of conduct, Ill. Rev. Stat., 1979, ch. 111½, par. 1005, was further empowered to adopt specific regulations prescribing standards governing the emission of noise beyond the boundaries of the property of any person. Ill. Rev. Stat., 1979, ch. 111½, par. 1025. The Act defines "person" to include a political subdivision or agency of the State. Ill. Rev. Stat., 1979, ch. 111½, par. 1003(i). Thus, it is clear that the State of Illinois intended that all of its political subdivisions, including the proprietors of publicly-owned airports, be subject to regulations adopted by the Illinois Pollution Control Board.

To the extent that the decision below renders questionable the ability of states to take effective action to abate the noise from public airports, Illinois is directly affected thereby. Currently pending before the Illinois Pollution Control Board is a proposal, submitted by the Attorney General of Illinois, for adoption of a statewide airport noise regulatory program quite similar to the California program at issue here. The Illinois proposal (Illinois Pollution Control Board Docket No. R77-4, "Proposed Airport Noise Regulations"), applicable to all public airports in Illinois, would impose specific noise limitations for airport operations as a whole, with enforcement and variance mechanisms, all similar to the California scheme. A decision regarding adoption of the proposal is expected within the next few months. However, the Court of Appeals decision places a

large cloud on the efficacy of the proposal, and if allowed to stand could render nugatory the entire regulatory scheme.

The decision of the Court below also raises serious issues of national importance regarding the relationship of the sovereign states to their political subdivisions. In effect, the decision could preclude a state from exercising its retained authority to direct and control the actions of its political subdivisions in the operation of the State's public airports. If allowed to stand, the decision threatens the ability of the States, including Illinois, to supervise and control their political subdivisions in the pursuit of legitimate state objectives, and in the end would compel each state to make the choice of either assuming direct ownership and control over public airports in that state or of vesting unlimited ownership and operational authority in its political subdivisions operating those airports. This constitutes an unwarranted intrusion upon each state's inherent power to structure its own internal government.

The action before this Court thus has far more than local significance. The decision below gravely threatens the power of the sovereign states, including Illinois, to control airport noise and likewise to control their subordinate agencies and political subdivisions in the exercise of their powers as airport proprietors, and to require the operation of airports in that state in a manner most highly reflective of the public interest. The State of Illinois respectfully submits that it has a substantial interest in these matters, and respectfully requests this Court to accept this *Amicus Curiae* brief and consider the views of the State of Illinois expressed herein, in support of the issuance of a writ of certiorari.

## SUMMARY OF ARGUMENT

The Court of Appeals has erroneously expanded the holding of *City of Burbank v. Lockhead Air Terminal, Inc.* (1973) 411 U.S. 624 to an entirely different factual situation, in finding preempted the State of California's attempts to enforce noise abatement efforts through its statewide regulatory program. The decision below usurps the wide-ranging authority of a state to regulate its political subdivisions and unjustifiably interferes with those relationships.

In addition, the premises upon which *Burbank* as well as the decision below were based have eroded with the passage of time and are currently untenable. This Court should reevaluate the federal regulatory scheme as presently constituted, so as to give life to legitimate state efforts to combat the airport noise problem.

## ARGUMENT

### THE DECISION BELOW ERRONEOUSLY EXPANDS THE HERETOFORE SHRINKING APPLICATION OF PREEMPTION TO A STATE'S EFFORTS TO CONTROL AIRPORT NOISE THROUGH REGULATION OF ITS POLITICAL SUBDIVISIONS.

#### A. A Sovereign State Has Unpreempted Authority To Regulate Its Political Subdivisions, Including Airport Proprietors Created And Existing Pursuant To State Law.

In holding that the imposition of an extended curfew on the Port District by the Department, as a condition of a variance from full compliance with statewide airport noise limitations, is unconstitutional because it invades a field preempted by federal law, the Court below relied almost exclusively on the decision in *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624. Both factually and as a matter of law, however, *Burbank* simply does not support that conclusion.

*Burbank* involved a challenge to the imposition of a curfew by a municipality on a privately-owned airport. Facing the Court, therefore, was the narrow situation in which a local governmental entity sought to exercise its police power over a non-governmental body. After a thorough review of the Noise Control Act of 1972, the Supreme Court declared that:

> [t]hat Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control. 411 U.S. at 633,

and that

> [i]t is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption [of the Burbank ordinance]. 411 U.S. at 633.

Despite its broad language, however, *Burbank* does not stand for the proposition that a state or local government may not exercise any power over, or in any way regulate, the opera-

tion of its public airports. The Court in *Burbank* carefully distinguished a government's exercise of police power from the exercise of its other governmental powers; the preemption holding is expressly limited to the pure police power ordinance that was before the Court:

> Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility in the area. But, *we are concerned here not with an ordinance imposed by the City of Burbank as "proprietor" of the airport, but with the exercise of police power* . . .
>
> . . . [A]uthority that a municipality may have as a landlord is not necessarily congruent with its police power. *We do not consider here what limits, if any, apply to a municipality as a proprietor.* 411 U.S. at 635, n. 14. (Emphasis supplied).

Concomitantly, because the question was not before it, the Court declined to consider the nature of the authority, other than police power, a state may possess to direct its subordinate political subdivisions to exercise their powers as airport proprietors. *Burbank* is limited factually to situations wherein nonproprietary governmental units seek to assert *police power* control over unrelated entities, 411 U.S. at 635, n. 14, and therefore does not directly control the instant case, which involves the exercise by a sovereign state of its inherent power to direct its subordinate political subdivisions in the exercise of their reserved proprietary powers.

The Court of Appeals thus has expanded *Burbank* past its own facts, despite the hesitation of the Supreme Court itself to do so. 411 U.S. at 635, n. 14. As *Burbank* has its foundation on a finding that Congress impliedly preempted the field of airport noise regulation through passage of the Noise Control Act of 1972, 42 U.S.C. 4901, such a step cannot be taken lightly. Findings of implied preemption are disfavored, see e.g. *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218; accordingly, such

a finding should not be extended beyond the facts on which it is based and the express holding of the Court unless it is clear Congress intended to preempt the particular action challenged.

As stated, the Court in *Burbank* shied away from analyzing the power of a governmental unit as a "landlord", 411 U.S. at 635, n. 14, i.e. as the entity in control over the physical and other resources that comprise a public airport. In recognizing that a political subdivision airport proprietor might have unpreempted rights and authority, independent of its police powers, the *Burbank* Court did not (nor did it need to) define the extent, or more importantly the source of that authority. Illinois submits it is precisely that issue which is of vital concern here and the one on which the decision below most seriously errs.

As invited by *Burbank's* footnote 14, federal courts since have picked up the ball and attempted to define the extent of the so-called proprietor's exception. Opting for a broad approach, the courts have consistently held that an airport proprietor has the unpreempted authority to impose use restrictions, including curfews, at its airport, so long as such restrictions are reasonable, and not arbitrary or discriminatory. *Santa Monica Airport Association v. City of Santa Monica*, 649 F. 2d 100 (9th Cir. 1981); *British Airways Bd. v. Port Authority of New York*, 558 F. 2d 75 (2d Cir. 1977); *National Aviation v. City of Hayward*, 418 F. Supp. 417 (N.D. Cal. 1976). Further, and of most importance, a three-judge federal court flatly refused to hold unconstitutional on preemption grounds the very regulations at issue here, specifically recognizing the authority of a sovereign state to direct its political subdivisions in the exercise of their proprietary power. *Air Transport Association v. Crotti*, 389 F. Supp. 58, 63-64 (N.D. Cal. 1975).

The rights of an airport proprietor to impose restrictions have also been both recognized and encouraged by the Federal Aviation Administration, the administrative agency charged by the Noise Control Act of 1972 with the primary responsibility

over aircraft and airport noise. See FEDERAL AVIATION ADMINISTRATION, AVIATION NOISE ABATEMENT POLICY (November 18, 1976) (hereinafter referred to as "Policy").

Among the use restrictions which FAA acknowledged remained within the unpreempted authority of the airport proprietor are limitations on the number of operations at the airport, curfews, and exclusion of particular types or classes of aircraft. *Policy*, at 57. Indeed, in its decision the Court of Appeals acknowledges the broader authority retained by airport proprietors, 651 F. 2d at 1316. It traces the origin of that authority to the need for proprietors to be able to take actions in hopes of insulating themselves from airport noise-related civil liability. See *Griggs v. Allegheny County* (1962) 369 U.S. 84. The Court below finds, by analyzing several factors discussed in *Griggs*, that the San Diego Port District is the entity legally responsible for the noise generated at its airfield, and thus is the "proprietor" thereof. 651 F. 2d at 1317-18. Accordingly, because it purportedly bears no liability for excessive airport noise from this airfield, the State of California is not a "proprietor" and thus not immune from the effects of preemption.[1] 651 F. 2d at 1319. However, as California has repeatedly argued, the question is not one of *who is the proprietor*, but rather one of *who may exercise or control the exercise* of proprietary powers over a public airport, a question not previously decided. Deciding this question requires recognition of the relationship of a sovereign state to its political subdivisions and the realities of the structure of state government. In addition, the Court below simplistically passes off the State's action here as an assertion of its *police powers;* 651 F. 2d at 1312; however, the State's ability to control its political subdivisions is more deeply and broadly based.

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1. Although the point has not been specifically decided, it is possible that the state may also bear some financial liability for damages caused by the emission of noise from airports owned and operated by its political subdivisions. See *Wisconsin v. Illinois* (1933) 289 U.S. 395, 410-412.

It is clearly impractical for a state to effectively perform all of its governmental powers and responsibilities directly through its legislative and executive branches. The inherent right of a sovereign state to create and control administrative agencies and political subdivisions for the convenient and efficient allocation and exercise of the various governmental powers of the state has been long recognized in this country. *Hunter v. Pittsburgh* (1907) 207 U.S. 161;[2] *City of Trenton v. State of New Jersey* (1923) 262 U.S. 182; *City of Newark v. State of New Jersey* (1923) 262 U.S. 192; and *Highland Farms v. Agnew* (1937) 300 U.S. 608. Those decisions make clear that a state has sole authority to regulate its political subdivisions and to distribute power and functions among its governmental organs.[3]

Pursuant to this inherent right to structure its internal government, the State of California, as has virtually every other state in the Union, chose not to exercise its undoubted right to own and operate its public airports directly. Instead, the State created various political subdivisions, such as the Port District, to hold title to the State's airports and delegated to them the authority necessary to operate those airports on a day-to-day basis. Further, California through its statewide airport noise control program has decreed that its public airports are to be operated so as to minimize adverse airport noise impacts. This is a policy decision regarding the use of stateheld resources.

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2. *Hunter* spoke only to a situation wherein a municipality holds property in its public, governmental capacity, and did not discuss the relationship of a municipality and its creator state with reference to property owned by a municipality in its private capacity. However, that distinction is not relevant here, since the operation of an airport by a municipality is a governmental, rather than a strictly municipal, affair. See *Trans-World Airlines v. City and County of San Francisco*, 228 F. 2d 473, 475-476 (9th Cir. 1955).

3. There are of course other constitutional limits to state power. See *Avery v. Midland County, Texas* (1968) 390 U.S. 474, and *Gomillion v. Lightfoot* (1960) 364 U.S. 339. However, these limiting decisions have dealt with the rights of *individuals* as against the states; they have not recognized any rights that political subdivisions may assert against the states. See *Sailors v. Board of Education of County of Kent* (1967) 387 U.S. 105.

Through its licensing and enforcement provisions, the California regulation evinces the legislature's intent to place the Port District under the authority of the California Department of Transportation. The Court of Appeals however, by reciting the indices of ownership vested in the Port District, 651 F. 2d at 1317-18, implies that the Port District thereby may legally resist the State's directives and exercise independent control of the airfield. As argued forcefully by Petitioners herein, such a decision which recognizes the right of the Port District to exercise its proprietary powers while denying the State the right to control the exercise of those powers, elevates a political subdivision of the state to the status of a sovereign, a position which it cannot hold as against its creator. *Reynolds v. Sims* (1964) 377 U.S. 533. The decision fails to recognize and effectuate the State's inherent rights to structure its own government and control the exercise of delegated powers by its political subdivisions, and by implication overrules *Hunter* and its progeny. This result is incorrect as a matter of law and must be reversed.

### B. Recognition Of The State's Authority To Regulate Airport Noise Is Compelled By The Failure And Refusal Of The FAA To Accomplish The Objectives Of The Noise Control Act Of 1972 And By The Need for Rational State Control Of Airport Noise Abatement Activities.

To the extent that *Burbank* has any application to this case, the holding thereof is of questionable validity in light of events subsequent to that decision. The premises underpinning the decision have largely evaporated, and the time is ripe for this Court to reevaluate the relationship between federal, state and local agencies in determining the statutory roles each may play in confronting the airport noise problem.

In *Burbank* the Supreme Court found that although Congress had not expressly preempted the field of airport noise, it had impliedly done so. This finding was based on two major premises: one, that the pervasiveness of the federal regulatory

scheme as authorized and directed by the Noise Control Act of 1972 compelled preemption, 411 U.S. at 633, and two, that the objectives of the statutory scheme could be met only through a uniform and exclusive system of federal control, free from cumbersome and contradictory local actions. 411 U.S. at 639. *Burbank* was decided only seven months after the Noise Control Act of 1972 became law. The decision brims with expectations that the federal government, armed with wide-ranging statutory authority, will marshal its forces and vigorously tackle the airport noise problem. Surely, aggressive federal initiatives would obviate the need for extensive, and possibly conflicting, local noise abatement activities. Unfortunately, little of the above scenario has come to pass.

First, the federal regulatory presence in this area has been anything but aggressive, let alone pervasive. In the more than eight years now since *Burbank*, the anticipated comprehensive regulatory scheme underlying the Court's implied preemption finding there has simply failed to materialize. The Environmental Protection Agency has acted pursuant to the authority granted it by the Noise Control Act [49 U.S.C. § 1431(b)(1)] by proposing for FAA enactment no fewer than eleven proposed regulations. Of these proposed regulations, the FAA has adopted one in full and portions of four others, and has published decisions not to adopt six and portions of four others.[4] One of these regulations that the FAA has failed to adopt is an "airport noise regulation" which would have required proprietors to institute certain noise control measures. Proposed EPA Reg. "Airport Noise Regulatory Process." 41 Fed. Reg. 51522 (22 Nov. 1976).

It is clear that the regulations adopted by the FAA are far from sufficient to deal effectively with the airport noise prob-

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4. See 41 Fed. Reg. 56056 (23 Dec. 1976); 41 Fed. Reg. 52393 (29 Nov. 1976); 41 Fed. Reg. 56046 (23 Dec. 1976); 41 Fed. Reg. 52398 (29 Nov. 1976); 43 Fed. Reg. 28406 (29 June 1978); 41 Fed. Reg. 52388 (29 Nov. 1976); and 46 Fed. Reg. 8316 (26 Jan. 1981).

lem as a whole, a fact acknowledged by FAA itself in establishing noise performance criteria for aircraft by type:

> . . . no determination is made under this part that these noise levels are, or should be accepted at, into, or out of, any airport. 14 C.F.R. 36.5.

FAA largely has concentrated its regulatory efforts (as the dissenting opinion in *Burbank* sagely predicted it would, 411 U.S. at 650-652) on the noise characteristics of the jet engine, leaving to others the opportunity to wrestle with other components of the airport noise problem, such as land usage, aircraft mix, hours of operation and the like. In fact, FAA has taken the position that it is the airport proprietor who is "primarily responsible for planning and implementing action designed to reduce the effect of noise on residents of the surrounding area." (*Policy*, at 5). Further, and most troubling, FAA has even gone so far as to judicially admit that it is not under a duty to control airport noise.[5]

Finally, in recently rejecting the EPA's proposed "Airport Noise Regulatory Process", FAA has interpreted the Aviation Safety and Noise Abatement Act of 1979, 49 U.S.C. 2101, as dictating a passive role for FAA in this area.[6]

Clearly, a large void has been created, one certainly not anticipated by the *Burbank* Court. It is a void into which states

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5. *State of Illinois, et al., v. William T. Coleman, et al.*, ___ F. Supp. ___, 15 ERC 1798 (D.D.C. 1981). The Court may take judicial notice of these proceedings. *Kamsler v. M.F.I. Corp.*, 359 F. 2d 288 (7th Cir. 1966), Federal Rules of Evidence 201(f). In their answer to the complaint the FAA denied that there was any duty to promulgate either general regulations under 42 U.S.C. § 1431(b) or as specifically proposed by the EPA pursuant to the Noise Control Act of 1972, 42 U.S.C. § 1431(c).

6. 46 Fed. Reg. 8316 (26 Jan. 1981). ASNA makes federal funds available through FAA to airport proprietors who, on a voluntary basis only, may study their particular noise problem and submit a plan identifying non-compatible land uses and means to reduce or eliminate those uses. In return for an approved plan, ASNA promises federal immunity to the proprietor from noise-related damage claims.

such as California and Illinois are willing to step in an effort to provide meaningful relief for its citizens from the serious and growing airport noise problem, were it not for outdated and unwise applications of preemption.

Secondly, *Burbank's* notion of a uniform system of federal control is equally suspect. As noted above, federal courts in the wake of *Burbank* have signalled a relatively green light to airport proprietors to impose use restrictions, based on the "proprietor's exception". The system then is not one of exclusive federal control, but rather is composed of as many actual and potential decision-makers in the system as there are public airports nationwide. As cited above, this is a system of control FAA both acknowledges and encourages, thereby greatly eroding uniformity as a basis for applying preemption.

Typically, although one municipality is the proprietor of an airport, it is the inhabitants of neighboring municipalities who find themselves significantly affected by the aircraft noise emanating from the airport. These neighboring non-proprietor political subdivisions and their citizens are, without doubt, by themselves powerless to exercise any type of police power control over the amount of aircraft noise to which they are subjected, on preemption grounds. See *Santa Monica Airport Association v. City of Santa Monica*, 649 F. 2d 100, 103, n. 3 (9th Cir. 1981). The state, acting pursuant to a broad regulatory problem, is the logical entity to make ultimate decisions on the allocation of resources and how the public interest is best served, and the least public harm caused, by the use of that airport. The Court of Appeals, however, would prevent a state from taking effective action in this area, leaving noise relief to the discretion of the airport proprietor or to the FAA, who many times have refused to step to the fore.

The Court below has unnecessarily invoked the preemption doctrine where not warranted by the facts, and gone far beyond the logical outreach of *Burbank*. Citing the impact the proposed extended curfew here would supposedly have on

operations at the airfield, the Court of Appeals states that *Burbank* applies as "stare decisis". 651 F. 2d at 1312. But here, where the state regulatory program has built-in standards and judicial review provisions to test the *reasonableness* of a State decision as to airport use, based on impact on interstate or local commerce or whatever, adequate protection against the supposed vices of non-federal airport noise control exists. See 21 Cal. Admin. Code § 5075. The untenable extension of *Burbank*, if left standing, would unjustifiably bar legitimate state actions to curb airport noise. This is an issue truly in need of this Court's review.

## CONCLUSION

The right of a sovereign state to regulate its political subdivisions, including airport proprietors created and existing in accordance with state law, has not been preempted. That authority, which naturally flows from the state's relationship with its political subdivisions, should be recognized by this Court.

In light of that and the foregoing, Amicus Curiae, the State of Illinois, urges this Court to review the crucial questions raised by the Court of Appeals' refusal to recognize this authority.

Respectfully submitted,

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# Amicus Brief

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No. 81-1101

IN THE

# Supreme Court of the United States

## OCTOBER TERM, 1981

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation, et al.,

*Petitioners,*

v.

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

# BRIEF AMICUS CURIAE OF COUNTY OF SAN DIEGO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Federal law preempts the action of the State of California in requiring the Port District, a political subdivision of the State, to extend its existing curfew as a condition to the grant of its second variance from the California State Noise Standards.

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# BRIEF AMICUS CURIAE OF COUNTY OF SAN DIEGO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INTEREST OF AMICUS CURIAE

The County of San Diego intervened as an amicus curiae in the District Court at the inception of this case and has participated throughout all proceedings in the lower courts. Pursuant to Rules of the Supreme Court, Rule 36.4, the County of San Diego now files this brief in amicus curiae.

The County's interests in this action are several and varied. First, the County is responsible under California statutory law

[Cal. Pub. Util. Code § 21669.4(b)] and the California State Noise Standards (Title 21, Cal.Admin.Code, Ch. 2.5, subch. 6) to enforce the California State Noise Standards at the subject airport, Lindbergh Field, which is operated by the Port District. Thus, the County has a prime interest in this action which seeks to challenge the constitutional validity of the actions taken by the State of California authorized under the variance proceedings of the State Noise Standards.

Second, the County has been an integral party at each and every one of the administrative proceedings conducted by the State of California concerning the Port District's applications for variances from the State Noise Standards at Lindbergh Field. At all four of the past such hearings, the County has actively participated and presented technical and expert testimony concerning noise abatement methods which can be implemented at Lindbergh Field. One such method proposed by the County at the second noise variance hearing was the 11:00 p.m. to 7:00 a.m. curfew which was ultimately imposed as a condition to the Port District's variance and is now being challenged in this action.

Third, the County is the primary local government who has continuously represented the interests of the citizens who reside in the noise impact area around Lindbergh Field and who daily suffer from unacceptable aircraft noise generated in and around the airport.

Consequently, the County has a substantial interest in this action which will ultimately impact other governmental entities throughout the State of California and may possibly be of national importance since the legislative and regulatory scheme adopted by the State to control airport noise and to develop comprehensive airport noise abatement programs is being challenged herein.

## SUMMARY OF ARGUMENT

The Port District, as an airport proprietor, is not preempted from extending its own existing curfew at Lindbergh Field. The crucial issue herein concerns the authority of the State of California to direct the Port District, its political subdivision and governmental airport proprietor, to extend its own proprietorship curfew to help achieve compliance with the California Airport Noise Standards. The decision in *City of Burbank* v. *Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, relied on by the Court below, did not have such an issue before it when the Supreme Court found a broad and pervasive federal preemption of airport noise control. Since the Supreme Court decision in *Burbank,* the Federal courts and the Federal Government have distinguished the *Burbank* rationale and have recognized the right of a state to regulate the exercise of the proprietary powers of its political subdivisions and other subordinate governmental entities of the state who act as airport proprietors. Such regulation is a necessary and lawful ingredient in the State's effort to alleviate the serious airport noise in California.

## ARGUMENT

### 1. THE DECISION BELOW MISINTERPRETED AND MISAPPLIED THE DECISION OF THIS COURT IN CITY OF BURBANK V. LOCKHEED AIR TERMINAL, INC.

The Ninth Circuit relied heavily upon the case of *City of Burbank* v. *Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624 as a basis for its decision in this matter. On the contrary, the facts in *Burbank* distinguish it from the case at bar and make the *Burbank* holding inapplicable to the present case.

In *Burbank,* this Court struck down an ordinance enacted by a city attempting to implement and enforce a curfew at a privately-owned airport. The lower court, in applying the *Burbank* holding to the present case, failed to make a distinction between a privately-owned airport being regulated by a city, and a governmental airport proprietor being restricted by the State to which it is a political subdivision thereof. A further and more intricate distinction can be made between *Burbank* and the present case in that the Port District, as airport proprietor, initiated its own curfew and the State merely attempted to expand that self-imposed curfew in contrast to initiating the use restriction itself.

These factual distinctions are important in that the ultimate holding in *Burbank* that the City was preempted from imposing such an airport use restriction by Federal law, is not applicable to a state's expansion of a self-imposed curfew of a governmental airport proprietor, especially when the State is authorized by the California Legislature under the State Noise Regulations to impose such use restrictions as a condition to variance permits issued to airport proprietors who are not complying with said State Noise Standards.

Even though the State of California is not attempting to directly impose a curfew herein but rather is directing the manner in which the Port District is to exercise its proprietary powers under the State Noise Standards, such State regulation in the field of airport noise control is not preempted by Federal law and therefore the decision in the *Burbank* case is not controlling herein. The *Burbank* case involved different facts than those before this Court. In *Burbank,* a city non-airport proprietor was precluded from imposing a curfew on a privately-owned airport. Unlike *Burbank,* the State herein is requiring its political subdivision to expand its own proprietary curfew and such action by

the State and the State's authority to impose such a requirement was not before this Court in the *Burbank* case.

2. THE LOWER COURT ERRED IN HOLDING THAT THE STATE OF CALIFORNIA LACKED AUTHORITY TO REGULATE ITS POLITICAL SUBDIVISION WHICH ACTS AS AN AIRPORT PROPRIETOR.

An airport proprietor is not preempted from imposing a curfew or extending an existing curfew. (Federal Aviation Administration [FAA] Aviation Noise Abatement Policy, November 18, 1976, page 57.) It is well established that airport proprietors may impose use restrictions at their airports in the nature of curfews so long as such restrictions meet the constitutional tests of nondiscrimination and noninterference with interstate commerce. In the case of *National Aviation* v. *City of Hayward* (N.D. Cal. 1976) 418 F.Supp. 417, the Court held that a city airport proprietor possessed the authority to enact a curfew to achieve noise abatement and was not preempted under Federal law from imposing such a restriction. Furthermore, the Court in *British Airways Board* v. *Port Authority of New York* (2nd Cir. 1977) 558 F.2d 75, upheld the right of the airport proprietor to exclude particular types of aircraft based on noise considerations.

It is clear that the respondent San Diego Unified Port District is a governmental entity acting as an airport proprietor and as a political subdivision of the State of California may therefore be regulated by the State in various aspects of its exercise of its proprietary powers. (*City of Coronado* v. *San Diego Unified Port District* [1964] 227 Cal.App.2d 455.) It has been held that the manner in which a state regulates its political subdivisions presents no federal question justiciable in a federal court. (*Dallas Independent School Dist.* v. *Edgar* [5th Cir. 1978] 255 F.2d

455.) Since the action of the State herein involved the conditioning of a variance applied for by the Port District (a political subdivision of the State), and since such action is provided for under state regulations concerning airport noise, such action regulating the manner in which the Port District exercises its legal and admitted proprietary powers with regard to the operation of Lindbergh Field is a proper regulatory activity and such regulation presents no federal question pursuant to the above authority. On the other hand, however, the Court below went further and held that such regulation was constitutionally infirm and preempted under the *Burbank* decision, but, as pointed out above, the *Burbank* decision did not address state regulation of its political subdivisions as airport proprietors.

State statutes and regulations concerning airport noise control, such as California's Airport Noise Standards, can permissibly and constitutionally reach government agency proprietors who are political subdivisions of the State. This principle authorizing states to regulate their political subdivisions in the manner in which they exercise their proprietary powers has been recognized to extend to the area of state controls and regulations of airport noise. In the case of *Air Transport Association of America* v. *Crotti* (N.D. Cal. 1975) 389 F.Supp. 58, at page 64 footnote 2, the Court clearly stated that a state statute concerning airport noise control can reach proprietors that are governmental agencies and hence arms of the state. In addition, the FAA Aviation Noise Abatement Policy, November 18, 1976, supports such state power when it unequivocally states, at page 33, the following:

> "The *Crotti* case upheld in part a California airport noise statute imposing noise abatement duties on airport proprietors and established the principle that a state statute could reach proprietors that are governmental agencies and hence arms of the state."

It is also important to note the action taken by the Federal Government in this matter wherein it was asked to review the variance condition imposed by the State of California requiring the Port District to extend its existing proprietary curfew at Lindbergh Field. The FAA concluded its comprehensive review by filing no formal objection to the variance condition and has further failed to enter this proceeding in the lower courts to formally object to or oppose the action of the State being challenged herein. Thus, this action by the FAA is consistent with the above quoted statement in the FAA Aviation Noise Abatement Policy which recognizes the power of the State to regulate in the fashion which the State has done in this case.

3. THE DECISION BELOW IS CONTRARY TO CONGRESSIONAL INTENT REGARDING FEDERAL PREEMPTION OF AIRPORT NOISE REGULATION.

As discussed above, the Ninth Circuit Court based its holding primarily on the *Burbank* case. The post-*Burbank* Federal Court decisions and pronouncements by the Federal Government show convincingly that the Federal Government never intended an all-pervasive preemption of all State and local activity or regulation in the airport noise control field. Recent Federal Court decisions and federal pronouncements support the proposition, rejected by the Court below, that a State can regulate the exercise of the proprietary powers possessed by its political subdivisions and other subordinate governmental entities of the State and that a state statute, such as the California State Noise Standards, can reach governmental agencies who are airport proprietors.

In the case of *National Aviation* v. *City of Hayward, supra,* 418 F.Supp. 417, the Court therein made an exhaustive analysis of congressional legislative intent in the area of airport noise

control and upheld a city airport proprietor's self-imposed curfew. The FAA in its Aviation Noise Abatement Policy similarly classifies a curfew as a use restriction which an airport proprietor can impose. (FAA Aviation Noise Abatement Policy, page 57.) Furthermore, the Congressional intent in the Noise Control Act of 1972 was not to totally preempt the field of airport noise control, but to affect recognized preexisting rights and powers of local government and airport proprietors to act in the area of airport noise control in a manner not inconsistent with federal law; a position reflected by the four justice dissenting opinion in the *Burbank* case. (*National Aviation* v. *City of Hayward, supra,* 418 F.Supp. 417; *British Airways Board* v. *Port Authority of New York, supra,* 558 F.2d 75; and FAA Aviation Noise Abatement Policy, November 18, 1976.)

## CONCLUSION

For reasons discussed above, a Writ of Certiorari should issue to review the decision of the Ninth Circuit Court.

DATED:

Respectfully submitted,

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NO. 81-1101

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE STATE OF CALAFORNIA, acting by and through the Department of Transportation, et al.,

*Petitioners,*

v.

SAN DIEGO UNIFIED PORT DISTRICT, et al.,

*Respondents.*

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 1982, three copies of the Brief Amicus Curiae of County of San Diego in Support of Petition for Writ of Certiorari were mailed, postage prepaid, to each of the following named persons:

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